Studies in Islamic Law and Society

13

William J. Donaldson

Sharecropping in the Yemen

A study in Islamic Theory, Custom and Pragmatism

Brill

SHARECROPPING IN THE YEMEN

STUDIES IN ISLAMIC LAW AND SOCIETY

EDITED BY

RUUD PETERS AND BERNARD WEISS

VOLUME 13

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A Study in Islamic Theory, Custom and Pragmatism

BY

WILLIAM J. DONALDSON

BRILL
LEIDEN · BOSTON · KÖLN
2000

This book is printed on acid-free paper.

Library of Congress Cataloging-in-Publication Data

Donaldson, William J.
Sharecropping in the Yemen : a study in Islamic theory, custom, and pragmatism / by William J. Donaldson.
p. cm. — (Studies in Islamic law and society, ISSN 1384–1130; v. 13)
Includes bibliographical references and index.
ISBN 9004114904 (cloth : alk. paper)
1. Sharecropping (Islamic law)—Yemen. 2. Sharecropping—Law and legislation—Yemen. I. Title. II. Series.
LAW
340.5'9—dc21 99-046291
CIP

Die Deutsche Bibliothek - CIP-Einheitsaufnahme

Donaldson, William J.:
Sharecropping in the Yemen : a study in Islamic theory, custom and pragmatism / by William J. Donaldson. – Leiden ; Boston ; Köln : Brill, 2000
(Studies in Islamic law and society ; Vol. 13)
ISBN 90-04-11490-4

ISSN 1384–1130
ISBN 90 04 11490 4

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PREFACE AND ACKNOWLEDGEMENTS

In view of the socio-economic importance of sharecropping as a major form of agricultural exploitation in many Islamic countries, not least the Yemen, it is somewhat strange that so little attention appears to have been given by researchers to the question of how Islamic law regulates the system in theory and how its regulations operate in practice. The aim of this book then is to investigate sharecropping in the Yemen against the background of Islamic law (the *Sharī'ah*) on the one hand and customary law (*'urf*) on the other. It is not claimed that this study is the definitive word on the matter. It is hoped however that, as an exploratory investigation into Islamic pragmatism in the field of agricultural tenancies, it will be of some interest not only to those whose specialisation is in Islamic law but also to social scientists from a range of disciplines whose research concerns the Yemen and rural and agricultural studies more generally.

The first half of this book is to do with how Islamic law views sharecropping in theory, and the information for this is drawn from a variety of primary and secondary literary sources. After a brief review of the rationale of sharecropping and its main features on the world scale, the focus is then brought onto the specifically Islamic aspects of the practice. The theoretical relationship between Islamic law and customary law is first discussed. Then those *ḥadīth*s (the Traditions relating the practice of the Prophet Muḥammad) which mention sharecropping and which form the starting point of all Islamic legal discussion are examined in detail, and how they are reflected in the modern Yemeni Civil Code is considered. This is followed by a detailed textual analysis of the views on sharecropping of four eminent Islamic jurists, chosen to represent the two main *madhhab*s (legal schools) to which most Yemeni jurists adhere: the Shāfi'ī School and the Zaydī School. The selected texts are the chapters on sharecropping in works by al-Shāfi'ī (d. 204/820) and al-Nawawī (d. 676/1277), representing the Shāfi'īs, and al-Mahdī Ibn al-Murtaḍā (d. 840/1437) and al-Shawkānī (d. 1250/1834), representing the Zaydīs.

The focus of the second half of the book is on sharecropping as it exists in practice in the Yemen. Here, a variety of textual sources (including written contracts and pleas, and *fatwā*s) has been complemented by information derived from interviews with farmers and other knowledgeable parties made during two field visits to the

Yemen. The current situation and arrangements are analysed as they exist first in sharecropping land, and then in sharecropping animals, the latter being an aspect of sharecropping which is generally overlooked. Finally, attention is given to sharecropping contracts and pleas and how disputes are resolved in the Yemen in practice.

I wish to thank all those who have contributed to enabling me to write this book and to collect the information on which it is based. First and foremost, I owe an immense debt of gratitude to the late Professor R.B. Serjeant. It was he who first stimulated my interest in Arabian customary law and suggested to me the topic of sharecropping in the Yemen, and it was through the substantial help and kindness he extended to me, literally right up to the day before he died, that I was able to make a start on the research. My thanks are also due to Mrs Marion Serjeant for her hospitality on many occasions.

I should also like to express my great appreciation for the help, support and encouragement I have received from the members of staff of the Department of Islamic and Middle Eastern Studies of the University of Edinburgh over the nine years I have been associated with the department. Dr Carole Hillenbrand has always been ready to give her time generously to dispense help and counsel, and she deserves my particular thanks. The late Dr Michael V. McDonald also afforded considerable time and assistance, especially in the early days in helping me get to grips with some of the more difficult parts of the primary texts which form a central part of the work. I should also particularly like to mention Professor Yasir Suleiman for his wholehearted support over the years.

In addition, I am greatly indebted to Professor G. Rex Smith, Emeritus Professor of Arabic in the University of Manchester, for his help and encouragement in my research over several years.

I am very grateful to many in the Yemen who have helped me in this research. In particular, I should like to mention H.E. Dr Ḥusayn al-'Amrī, the Yemeni ambassador to London, and also a renowned scholar; the Qāḍī Ismā'īl bn 'Alī al-Akwa' of Ṣan'ā' for his early wise advice in my fieldwork; and Dr 'Abd al-Wahhāb Rāwiḥ, formerly Dean of the Faculty of Arts, University of Ṣan'ā', for much practical help during my stays in the Yemen. Also in the Yemen, I owe thanks to numerous public officials of several Yemeni government ministries and institutions for easing my way, including, in Ṣan'ā', Mr Khālid al-Surayḥī, Mr Muḥammad al-Suwārī, and others of the staff of the

Yemeni Research Centre (Markaz al-Dirāsāt wa-al-Buḥūth al-Yamanī), especially Dr Murshid Shamsān Aḥmad for his considerable generosity in allowing me sight of documents and other works not otherwise available. In addition, thanks must be given to the staff of the Yemeni Ministry of Agriculture in Ṣan'ā' and its regional offices and agricultural project centres at Ibb, Zabīd, al-Qā'idah, Dhamār, and elsewhere. Their number is too great for me to mention them all individually here, but I should particularly like to thank the following who were especially generous with their time, assistance and hospitality: Mr Muḥammad Aḥmad Ghālib and Mr Aḥmad Qāsim, of the Tihāmah Development Authority (al-Hay'ah al-'Āmmah li-Taṭwīr Tihāmah), al-Ḥudaydah; and Mr Jābir 'Abd al-Malik, Director of the Agricultural Centre (al-Mujamma' al-Zirā'ī), al-'Udayn.

Finally, I owe an especial debt to the numerous sharecroppers, landowners and other members of the Yemeni public who submitted good humouredly to my questioning and offered me considerable hospitality in the field. Without their assistance and kindness the research that I have attempted here could not have been carried out.

Nevertheless, I myself am wholly responsible for any faults and omissions which may appear in what follows.

NOTE ON TRANSLITERATION

The system adopted in this book for transliterating Arabic into Roman characters is in essence that advised by the editors of *New Arabian Studies* (published by the University of Exeter Press) with very few modifications. In brief, the system as used here is as follows.

Consonants:

ب	b	ز	z	ف	f
ت	t	س	s	ق	q
ث	th	ش	sh	ك	k
ج	j	ص	ṣ	ل	l
ح	ḥ	ض	ḍ	م	m
خ	kh	ط	ṭ	ن	n
د	d	ظ	ẓ	ه	h
ذ	dh	ع	‘	و	w
ر	r	غ	gh	ي	y

ة is normally represented by h, but by t when it terminates the first element of an *iḍāfah* or when *iʿrāb* (grammatical vocalisation) is shown.

Hamzah is transliterated with an apostrophe ’ when it is in a medial or final position, but is left untransliterated when initial.

Vowels and Diphthongs:

ـَ	a	ـَا	ā	ـَى	ā
ـِ	i	ـِي	ī		

ـُـ u ـُو ū

ـَوْ aw

ـَيْ ay

The short vowels of *i'rāb* (indicating case, mood, etc.) are not generally shown, even in connected quotations, except quotations from the *Ḥadīths* (the Traditions of the Practice of the Prophet) and other sources when the grammar has to be explicitly shown. In such situations, the short final vowels, and *tanwīn*, are shown in superscript: $^{-a}$, $^{-an}$, etc.

Nisbah endings are normally written *-ī* (masc.) and *-īyah* (fem.), except when fully vocalised, in which case they are written *-īy*^{un}, *-īyat*^{un}, etc.

The letter *alif*, when acting as the "chair" for a *hamzah*, is represented by the original vowel of the *hamzah*, even if in pronunciation this would be elided.

The definite article is always written al-, even before the "sun letters", and irrespective of any preceding vowel.

Single letter words are linked to the following word with a hyphen. Similarly, pronominal suffixes are generally separated by a hyphen from the word to which they are attached.

So, for example, the sentence:

ساقيتُك على هذا النخل بكذا

("I (have) engage(d) you in a *musāqāh* contract over these date-palms in such-and-such a way")

would be transliterated: *Sāqaytu-ka 'alā hādhā al-nakhl bi-ka-dhā,*

Proper Names:
Common place names which have accepted English spellings are not transliterated (so: Medina, rather than al-Madīnah; Aden, rather than

'Adan). The name of the capital of the Yemen has however been strictly transliterated and written Ṣan'ā' throughout.

In personal names which are compound and begin with "'Abd" the elements of the name have been left as separate words: so, for example, 'Abd al-Raḥmān. The only exception to this is the name 'Abdallāh (rather than 'Abd Allāh).

بـــن in male personal names ("son of") has been transliterated "bn" (rather than the more usual "b."), except when it forms the first mentioned element of a name (ابن), when it is written "Ibn": so, for example, 'Abdallāh bn 'Umar, but Ibn 'Umar.

Vernacular:
On a few occasions (in Part II) it has been thought best to reflect (to an extent, at least) Yemeni colloquial speech, rather than attempt to regularise it to Standard Arabic. So, for example, there will occasionally be shown non-standard changes in vowel quality (e.g., *kill* for *kull*; *yi'allif* for *yu'allif*; *ō* for the diphthong *aw*) and other non-standard elements (e.g., *shī* or *shay* for *shay'*; *mish* for *ghayr*[a] or *laysa*).

Quotations from other Authors:
In quotations taken from other authors, the transliteration of the original is retained.

In the same way, variant English spellings in quotations are also kept. Thus, for example, in the text of this book, "sharecropper" is spelt as a single word, though quotations from other authors have been included in which the word is hyphenated ("share-cropper") and the hyphenation has been retained in such quotations.

NOTE ON THE METHOD ADOPTED FOR REFERENCING SOURCES

References to modern literary sources are given in the footnotes of the book in the manner for long common in the sciences and social sciences, and increasingly found in certain disciplines in the arts and humanities: that is, by surname of author and year of publication (so, for example, Smith 1776), and the bibliographic details are to be found in the Bibliography under this reference. In cases where more than one work published in a single year by a given author has been cited, then each is suffixed by a letter (so, for example, Serjeant 1981a, and Serjeant 1981b).

References to articles in the *Encyclopaedia of Islam* are given by the surname of the contributor, followed by *EI*[1] (for the original edition) or *EI*[2] (for the new edition), and the name of the article.

In the case of older Arabic works, manuscripts and other primary sources, the work is referenced in the footnotes by the name by which the author is generally known followed by a shortened form of the title (rather than the date of publication, even where this is known). Thus, for example, the *Ṣifat Jazīrat al-ʿArab* by Abū Muḥammad al-Ḥasan bn Aḥmad bn Yaʿqūb al-Hamdānī (d. ca. 336/947), in the edition of Muḥammad bn ʿAlī al-Akwaʿ al-Ḥawālī and published in Riyāḍ in 1394/1974, is referenced in the footnotes as: al-Hamdānī *Jazīrat al-ʿArab*, under which reference the full details will be found in the Bibliography, the definite article in the names of Arabs being ignored for the purposes of alphabetic sorting.

Page numbers are given in the footnotes after the short reference, and are preceded by a colon: so, for example, al-Sharjabī 1990 :150-51 and 154. Where a volume number is required, it is put in Roman numerals after the colon and before the page number(s): so, for example, Yāqūt *Muʿjam al-Udabāʾ* :VI, 394-95.

Line numbers, where necessary, are given in subscript immediately after the page number: so, for example, lines 4 to 6 on page 64 of volume 5 of a work would be indicated as :V, 64_{4-6}.

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CHAPTER ONE

INTRODUCTION

1.1 INTRODUCTORY REMARKS

Sharecropping may be defined, briefly, as a system of leasing in which the rent is expressed as a proportion of the harvest (such as a half or a quarter) rather than as an absolute value (such as a certain fixed monetary amount or so many tons or bushels of produce). It is an interesting subject from several points of view. In many areas of the world, including much of the Middle East, it is a major form of land tenure, and for this reason alone it merits study by researchers from a wide variety of disciplines, including historians, economists, anthropologists and specialists in agricultural and rural development. In the Yemen, it is indeed the dominant system by which agricultural land is leased, and it is Yemeni sharecropping which is the focus of this book. In the Yemen too, and elsewhere, animals can also be "sharecropped", though there would seem to be very little discussion of this practice in the literature. Nevertheless, despite the fact that sharecropping is so widely found in Islamic countries, a problem arises in Islamic legal theory over the practice. The basis of the problem is that the rent in the lease cannot, by definition, be stated in absolute terms at the time the contract is drawn up, but only in terms of a proportion of the future harvest. That is to say, the absolute amount of the rent will be unknown until the crop is gathered. In general, the theory of Islamic contracts abhors such unknown elements. A major theme of this book will be to examine the restrictions that Islamic theory places on the operation of sharecropping and the methods by which the practice can be made acceptable.

The layout of the book is as follows. The rest of this chapter will present a brief geographical and historical overview of the Yemen as contextual background. The concern of Part I, comprising Chapters 2 to 5, is the discussion of the theoretical basis of sharecropping. In Chapter 2, a short review of sharecropping on the world scale and its rationale is followed by an introduction to the specifically Islamic aspects of the practice. In Chapter 3 the Islamic principles are examined in greater detail. The dozen or so *ḥadīth*s (Traditions of the

practice of the Prophet) which mention sharecropping and which form the starting point for all Islamic judicial discussion are analysed, and the position adopted on the practice by the main Schools of Islamic law is overviewed, before an appraisal is made of how these views are reflected in the modern Yemeni Civil Code, *al-Qānūn al-Madanī*. Chapters 4 and 5 examine the standpoints of, respectively, the Shāfi'ī School and the Zaydī School, these being the two most important Islamic legal Schools in the Yemen, as they are reflected in the works of four selected jurists.

Part II investigates how sharecropping is carried on in practice in the Yemen. Chapter 6 is a detailed examination of sharecropping land in North Yemen at the present time, while Chapter 7 addresses the practice of sharecropping animals, which is still found in rural areas, even if less so than previously, but which has been generally overlooked by investigators. Certainly, the Islamic jurists never pronounce on it. Chapter 8 focuses on the contractual aspects of sharecropping in the Yemen and how any disputes that may arise between the parties to sharecropping contracts are resolved.

The sources which form the basis of this book are drawn from a number of different and sometimes overlapping fields. First, there are works which deal with Islamic law, and within this category, those with explicit reference to the Islamic legal attitude to sharecropping. Then there are studies in the field of customary law, and specifically customary law in the context of Arabia and the Yemen. There are also works on the Yemen of a more general nature which have references to sharecropping or to contextual background information on the country, and which range from travellers' descriptions to commissioned reports on the agriculture or rural development of the Yemen. A brief discussion of the sources both primary and secondary can be found at the end of the book (pp. 215-23).

1.2 THE YEMEN: A CONTEXTUAL OVERVIEW

1.21 A Geographical Sketch

The area known as the Yemen occupies the southwest corner of the Arabian peninsula, a position which has been of great strategic importance historically, with coastlines on both the Red Sea on the west

and the Arabian Sea and Indian Ocean on the south and east. Its land boundaries with the Ḥijāz to the north, with central Arabia to the northeast and with Dhofar (Ẓafār) and Oman to the east have been historically indeterminate and changeable. Since the merger in May 1990 of the former Yemen Arab Republic (YAR), or North Yemen, with the former People's Democratic Republic of Yemen (PDRY), or South Yemen, most of the historical Yemen has formed one political unit, known now officially as simply the Republic of Yemen (*al-Jumhūrīyah al-Yamanīyah*). It is to be remarked however that the historical entity of Yemen is generally taken to include the regions of 'Asīr and Najrān which currently lie within Saudi Arabia to the north. Further, its recent unification is a relatively novel development: most of the country's history has been characterised by political fragmentation.

The area of the present unified republic is impossible to state with accuracy (figures vary from about 156,000 square miles (405,000 km^2) to as much as 205,000 square miles (530,000 km^2)), since its eastern desert frontier with Saudi Arabia in the Empty Quarter (al-Rub' al-Khālī) has never been agreed in international law and is still open to disputes between the two countries, disputes which have become rancorous in the last couple of decades because of that region's potentiality for petroleum discoveries.

The population of the country similarly can be given in only approximate terms. The latest population census for the North Yemen (the former YAR) which has been obtainable at the time of writing is that taken in 1986 and for the former PDRY is that of 1988.[1] Those sources give the population of the North Yemen as 9,371,692, and for South Yemen as 2,076,339, making a total for the unified country of 11,448,031. These figures include 42,512 males and 334,231 females in the North Yemen estimated as "unenumerated for technical and social reasons", and a further 804,007 males and 364,192 females estimated North Yemenis residing outside the country. It can be assumed that most of the North Yemeni males outside the country were working in the Gulf emirates and Saudi Arabia.

---

[1] The figures to be quoted below are taken from the 1990 Statistical Yearbook (Yemen Republic 1991: 3-4). Although another census was planned for the united Yemen in January 1994 (as announced in *The Yemen Times*, 8 January 1993, p.2), the published results have unfortunately not become available to the present author at the time of writing.

To what extent these population figures were accurate even when the censuses were taken is open to debate; but moreover, events since the late 1980s have undoubtedly altered the situation considerably. For several decades the Yemen has had one of the world's highest birth rates, but because of poor rural health resources the high birth rate was largely counteracted by a high infant death rate. However, even in 1990 well over half the population was projected to be under 19 years of age,[2] and continually improving health facilities over recent years will no doubt emphasise even further the youthfulness of the population, and with it increase the economic pressures in providing educational resources and employment prospects to which it gives rise. Traditionally, levels of unemployment or underemployment have been mitigated by the migration of Yemenis to work abroad, especially, since the Second World War, in the oil-rich Gulf states and Saudi Arabia, though among earlier generations Yemenis often went farther afield—to Southeast Asia and to Europe.[3] However, the Yemeni government's friendly stance towards Iraq at the time of the invasion of Kuwait in 1990 and the subsequent Gulf War produced the predictable reaction by the Gulf emirates and Saudi Arabia of cutting off aid to the Yemen and the expulsion of all Yemenis. Since then, the Yemeni currency, the rial (*riyāl*), has fallen steadily in value, reflecting a deep malaise in the country's economic health.

The physical geography of the country is the result of two related geological processes: the down-faulting of the Red Sea (as the northwards extension of the East African Rift Valley), and the tilting upwards of the southwest corner of the Arabian massif.[4] As a result, the Yemen forms the highest part of the Arabian peninsula, with several peaks well over 10,000 feet (3000 m) and culminating in Jabal al-Nabī Shu'ayb at 12,340 (3760 m). The country can be characterised as a huge escarpment, with the scarp facing southwest and deeply dissected by valleys. An appreciation of this structure, shown schematically in Figure 1.1, is fundamental not only to understanding

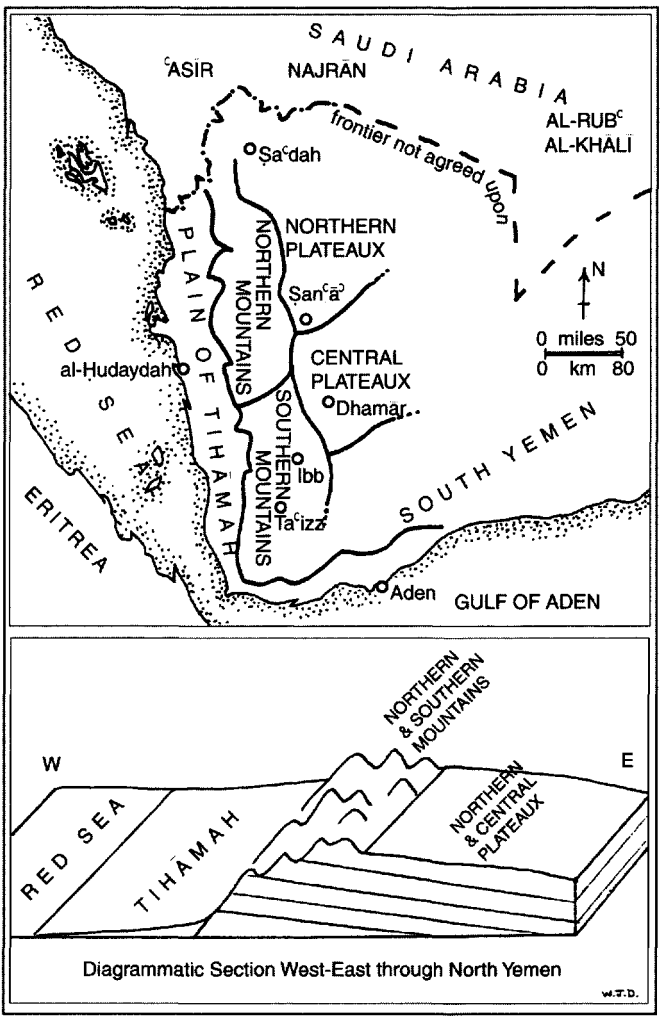
[2] In 1990, 55% of the urban population and 59% of the rural population were estimated to be aged between 0 and 18 (Yemen Republic 1991: 4).

[3] Among the studies of Yemeni migrant workers, in Britain for example, are Halliday 1992 and Lawless 1994.

[4] This geological process is not yet complete and is the cause of recurrent seismic activity in the country. The most recent serious earthquake occurred in 1982, with its epicentre near Dhamār.

the variety of the physical regions of the Yemen but also the variations in climate and vegetation, and hence also in agriculture. Figure 1.1 gives also the regional names to be used throughout this book and in particular in Part II which deals specifically with the practical aspects of sharecropping in the Yemen.

Figure 1.1. The Physical Regions of North Yemen referred to in this book



1.22 Climate and Agriculture

Climatically, the Yemen varies from tropical desert (on the coastal plain of Tihāmah and in the southern and eastern parts of the country) through wet sub-tropical regions (principally, the valleys on the western edge of the escarpment) to warm temperate and cool temperate zones (on the high plateaux and in the high mountains). The annual climatic régime for most of the country is governed by the alternation of dry northerly winds in the winter and the monsoon in the spring and summer. The rains from the monsoon occur in two fairly well defined periods, March to May from the eastern monsoon, and July to September from the southwestern monsoon, and although they fall almost wholly in the mountain regions they benefit indirectly in the form of run-off the plain of Tihāmah and the otherwise dry valleys of the south, notably the valley of Ḥaḍramawt and its tributaries, both in replenishing the water-table and in providing spate water which can then be channelled appropriately for agricultural purposes. Periods of low monsoon rainfall, as occurred in the 1960s and again for much of the 1980s, therefore affect detrimentally the whole of the Yemen, since the monsoon rainfall is fundamental, directly or indirectly, to all the various irrigation methods found in the country. The sources of agricultural water, the distinction between which will be found later in the book to be of analytical use (especially in Chapter 6 when sharing systems are considered in detail), can be considered under four headings:

a) Irrigation from wells:
Wells tap underground water vertically and depend on the water-table being replenished from rainfall. Traditionally water for agricultural purposes was raised by human or animal power, but most of the old wells which are still working are now equipped with diesel or petrol driven water pumps, while new wells are generally of the tube well kind and are regularly fitted with pumps.

b) *Ghayl* (pl. *ghuyūl*):
As a general term, a *ghayl* is simply a surface stream, but its more technical meaning in the Yemen is an artificial channel dug to tap the underground water source using gravity flow, on the same principle as

the *falaj* of Oman and the *qanāt* of Iran.[5] Typically, the first section of the channel will be underground, before it emerges onto the surface and, following closely the contours of the land, is led off to the irrigable areas. *Ghayl* irrigation is typical of the mountain and high plateaux areas of the Yemen.

c) *Sayl* (pl. *suyūl*):
In the Yemeni context a *sayl* is a surface flood which is caused by sudden rainfall upstream and which can then be channelled artificially by systems of barrages, weirs and sluices to cultivated land. The system is characteristic of especially the piedmont zones of the Tihāmah plain and the southern Yemen, where it is particularly well developed.[6]

d) Direct rainfall:
In years of abundant rainfall large areas of the Yemen, and especially the high plateaux, can be cultivated which are not reached by the above irrigation methods. To maximise the effectiveness of the available rain, areas of land several times larger than the cultivated fields, and upstream of them, are cleared of stones. These cleared areas then act as catchment zones to funnel the water to the fields. Some deciduous orchards in the mountains and the high plateaux are reliant solely on rain, but it is cereals particularly which depend on this fluctuating source.

The range of crops grown in the Yemen reflects the wide variety of climatic régimes—from tropical to cool temperate. Of the cereals, sorghum (*dhurah*)[7] is by far the single most important, regularly

[5] For a description of the ancient *ghayls* of Ṣan'ā', see Serjeant, Costa and Lewcock 1983: 19-31. For the Omani *falajs* see Wilkinson 1974, and for the *qanāts* of Iran, see Lambton *EI*[2], article "*Ḳanāt*". For a discussion of possible origins of this irrigation method, see English 1968 and Wilkinson 1980.

[6] For details of how *sayl* irrigation is practised in the Yemen, see for example Maktari 1971 and Serjeant 1964.

[7] The Arabic names given in the following paragraphs for crops are those most commonly heard in the northern Yemen, though it should be noted that many of the terms refer to different crops elsewhere in the Arab world. Thus, for example, in many Arabic speaking countries, *dhurah* is maize rather than sorghum, while *barqūq* outside the Yemen often means plum rather than apricot.

accounting for a half or more of the country's grain production.[8] Several different varieties of sorghum are grown throughout the Yemen (those called locally *ḥamrā* ("red"), *bayḍā* ("white") and *ṣafrā* ("yellow") being the most common) with the exception of the high mountains, where its place is taken by wheat (*qamḥ*) and barley (*sha'īr*), and the hottest parts of Tihāmah and southern Yemen, where millet (*dukhn*) is substituted. Maize, another important grain crop (known locally as *dhurah shāmī(yah)*, "Syrian sorghum", or *dhurah rūmī(yah)*, "Byzantine sorghum", or simply *shāmī* or *rūmī*), is found very much in the same areas as sorghum.

Concerning fruit, official statistics show, perhaps somewhat surprisingly, that the single most important fruit is grapes (*'inab*), which account for almost half the fruit production.[9] The high plateaux, and in particular the Ṣan'ā' area, are the chief grape producing areas, and while no doubt a considerable part of the harvest is sold as dessert grapes, it is nevertheless likely that most of the production is converted into raisins (*zabīb*). After grapes, bananas (*mawz*) and papayas (*bubāyā*) are the next most important fruit and are grown in southern Yemen, on the plain of Tihāmah and in the hotter lower valleys of the mountains, while dates (*balaḥ*), found also in those same areas, are fourth in terms of production. Other tropical and sub-tropical fruit crops include mangoes and various varieties of citrus, including oranges (*burtuqāl* or *burtuqān*) and lemons (*laymūn*), both of which seem to have been increasing in production in recent years. In contrast, temperate fruit crops such as apples (*tuffāḥ*), pears (*ijjāṣ* or *kummathrā*), apricots (*barqūq*), quinces (*safarjal*) and peaches (*firsik*), which are grown on the high plateaux and in the mountains, are individually produced in much smaller quantities, though even so they can be locally important crops.

Other crops which are of significance in the local diet are the various pulses and legumes, which are grown throughout Yemen, the variety being chosen according to the climate. In terms of size of production, chickpeas (*lūbiyā*) are individually by far the most important

[8] The official crop statistics for 1990 and 1991 (the two most recent years for which figures are available at the time of writing) show that sorghum accounted for respectively 58% and 55% of Yemeni grain production, and covered 60% of the land devoted to grain (Yemen Republic 1992: 8).

[9] 45% of the total fruit tonnage in 1990 and 44% in 1991 (Yemen Republic 1992: 47-48).

of this group,[10] though a particularly Yemeni liking for fenugreek (*ḥulbah*) should be mentioned since it results in a sizable production of that pulse. Various vegetables and other annual crops, including especially potatoes (*baṭāṭis*), tomatoes (*ṭamāṭam*), onions (*baṣal*), peas (*'atar*), a distinctive type of leek (*kurrāth*), and several sorts of melon (including *baṭṭīkh* and *faqqūz*) complete the survey of the most important food crops grown in the Yemen.

In addition, most Yemeni farmers grow fodder crops for their domestic animals. By far the most important of these are sorghum cut green (*'alaf dhurah*) and alfalfa (*qaḍb* or *barsīm*). Cotton (*quṭun*) is grown in some parts of Tihāmah.

One further crop, not so far mentioned, is of immense social and economic importance in the Yemen, and almost uniquely so in the world. This is the crop called *qāt* (*Catha edulis* Forskål), the leaves of which yield a blend of mild narcotics and are chewed, traditionally by a large part of especially the male population, in the afternoons and evenings.[11] At the communal *qāt*-chewing sessions all subjects from poetry to politics are discussed. The *qāt* plant grows into a sizable evergreen bush or small tree in the mountain districts and high plateaux of the northern part of the country and the use of the leaves is heaviest in these areas.

The regions from which field information will be particularly drawn in this book (especially in Part II) are located in North Yemen (as was shown in Figure 1.1 above), and their characteristics from the points of view of climate, source of agricultural water and main agricultural crops may be summarised as follows:

Northern Mountains:
Cool climate on the upper slopes, warm in the valleys;

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[10] In both 1990 and 1991 chickpeas accounted for 58% of the Yemeni crop of peas, beans and other pulses (Yemen Republic 1992: 75).

[11] Many studies of *qāt* are available from specialists in different disciplines. For the place of *qāt* in Yemeni society, see for example Chelhod 1972, Schopen 1978 (especially 103-07), Weir 1985 and Kennedy 1987. For the narcotic chemicals contained in the leaves which are released by chewing and their physiological effects, see Bā Dhīb 1991: 39-40, and Schopen 1978: 89-93. There are a great many names for different varieties and qualities of *qāt*, and moreover the names vary considerably from one district to another. The present writer collected 16 such names in Ṣan'ā', and another five names at Ibb, all of which were different from those on the Ṣan'ā' list, though even so these lists are far from exhaustive: Schopen (1978: 66-70, 78, and 97-98) for example catalogues some 36 named regional varieties in addition to seven names for different types of *qāt* leaf.

Typically *ghayl* irrigation and rain-fed agriculture, with *sayl* irrigation and wells in the lower valleys;
Deciduous fruit trees and *qāt* plantations on higher slopes; coffee, bananas, mangoes and other tropical and sub-tropical crops in the valleys.

Northern and Central Plateaux:
Cool winters and warm summers;
Rain-fed agriculture and pump wells, with *ghayl*s close to mountain edges;
Grain crops, and deciduous fruit orchards and *qāt* plantations.

Southern Mountains:
Warm to hot climate with high rainfall;
Typically *ghayl* irrigation and rain-fed agriculture;
Deciduous fruit trees and *qāt* plantations on higher slopes; coffee, bananas, mangoes and other tropical and sub-tropical crops in the valleys.

Central Tihāmah:
Hot to very hot summers, and warm winters; humid near the coast in summer;
Pump well irrigation, with *sayl* irrigation especially important towards and within the piedmont zone;
Dates, bananas, mangoes and other tropical and sub-tropical fruit crops, with heat-tolerant sorghum varieties and millet as the main grain crops.

1.23 A Note on the Administrative Divisions of the Yemen:

Since at various points in Part II of this book mention will be made of terms for the various administrative divisions of the country, a brief word will be said about them here.

The system of administrative divisions is not consistent over the whole country. This is not surprising, given the very different recent histories of the former North Yemen and South Yemen. Even in the North, there is no overall uniformity. A complete hierarchy of the traditional administrative divisions and subdivisions might appear as follows, in descending order of size, though some levels in the hierarchy are lacking in some areas and elaborated in others. The

suggested English terms are of course only approximate and are given only to indicate the relative sizes of the divisions.

liwā'	"province" or "governorate"
qaḍā'	"governorate"
nāḥiyah	"district"
'uzlah	"parish"

Below the *'uzlah* there is the *mamsā* (a small group of houses)[12] and the *maḥallah* or *maḥillah* (an isolated house), though neither can be considered an administrative division.

1.24 A Brief Historical Overview

Known to the Classical world as Arabia Felix, by reason of its great agricultural productivity in contrast to most of the rest of the peninsula, the Yemen in the pre-Islamic period was the centre of a succession of powerful states or kingdoms. The wealth of these states was based largely on the agricultural fertility, and also on their command of the production of frankincense and their strategic position to control trade routes between the Mediterranean and the Indian Ocean. The rupture of the great dam at Ma'rib, put legendarily in AD 525, is often taken to mark the end of the last of these pre-Islamic Yemeni states, that of Ḥimyar, though the breach of the dam is unlikely to have constituted the sole cause nor to have been a single event. Rather, there is archaeological evidence which indicates several breaches and subsequent rebuildings,[13] and it is probable that the influence of the Yemen had been waning ever since the Romans began extending their power into the Red Sea in the first century AD. In the hundred years before its conversion to Islam, the country had been controlled first by the Christian Aksumites (Ethiopians),[14] and then by the Persians who briefly made the country a satrapy of the Sasanid Empire. According to Muslim sources, the last Persian governor converted to Islam in 6/628.

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[12] Cf. *mamsīyah* in Piamenta 1990-91: 466b.

[13] In a detailed study of aerial photographs, field analysis of sediments and other geomorphological techniques, Ulrich Brunner has concluded that there is evidence for three historical breaches of the dam in the fifth and sixth centuries AD which were repaired (ca. AD 450, 542 and 580), and a fourth breach at the beginning of the seventh century AD which was not repaired (Brunner 1983: 123-24).

[14] Abrahā was the leader of the Aksumites in the Yemen who was in power when the Prophet Muḥammad was born ca. AD 570.

After the establishment of Islam in the Yemen the next most important event for the history of the country occurred in 283/896 when there arrived a Ḥijāzī descendent of 'Alī bn Abī Ṭālib, the Prophet's son-in-law (d. 40/661), through the line of 'Alī's son al-Ḥasan. This descendent was the Imām Abū al-Ḥusayn Yaḥyā, called al-Hādī ilā al-Ḥaqq (d. 299/911). He established himself at Ṣa'dah in the north of the country and it was he who introduced Zaydī doctrines and founded the Zaydī state. Most of all the subsequent Zaydī imāms are descendants of his line through his son Aḥmad.[15] Although several of the imāms managed to extend Zaydī control southwards, sometimes as far as Zabīd in Tihāmah (as in the mid-sixth/mid-twelfth century), different parts of the Yemen were frequently governed, until the twentieth century, by rival non-Zaydī rulers and dynasties. The origins of some of the dynasties, such as the Yu'firids (232-387/847-997) with their base first at Shibām-Kawkabān and later at Ṣan'ā', were local. Others were the result, directly or indirectly, of intervention in Yemeni affairs by Islamic powers to the north, as was the case with the emergence around 439/1047 of the Ismā'īlī Ṣulayḥid dynasty which for almost a century ruled much of the southern part of NorthYemen, first from Ṣan'ā' and then from Dhū Jiblah. More than once a governor sent by an Islamic power based in Iraq or Syria or Egypt usurped its authority and founded a dynasty of his own. Such had already occurred before the arrival of al-Hādī, when, in the early third/ninth century, Muḥammad bn Ziyād was sent to govern the Yemen by the 'Abbāsid caliph al-Ma'mūn (*reg.* 198-218/813-833) and founded his own albeit short lived dynasty, the Ziyādids, with their capital at Zabīd, a town which they founded. A similar event was to occur in the early seventh/thirteenth century when the descendants of a certain 'Alī bn Rasūl, who had arrived in the Yemen from Egypt in the wake of the Ayyūbid take-over of the country, seized power and held it as the Shāfi'ī Rasūlid dynasty with its capitals at Ta'izz and Zabīd for over two centuries from 628/1229 until 858/1453. The interest in the Yemen on the part of the ruling power in the eastern Mediterranean is indeed something of a theme in Yemeni history, as it was to recur in the case of the Ottomans, who

[15] For the genealogy of al-Hādī see Eagle 1994, including the table on p.117; and also Dresch 1993 especially pp.167-71. For more on the Zaydī School, see Chapter 5 below, including the references cited there.

occupied varying parts of the country on two occasions: the first from about 945/1538, an occupation which lasted a century, and the second from the mid-thirteenth/mid-nineteenth century which was formally terminated at the end of the First World War.

Any useful "thumbnail sketch" of Yemeni history is therefore difficult if not impossible to make. One important feature does however stand out from at least early Islamic times until the present day. That feature is the division of the country into two broad zones which are conventionally called Upper Yemen (*al-Yaman al-a'lā*) and Lower Yemen (*al-Yaman al-asfal*). Although the precise boundary between them has fluctuated over the centuries, nevertheless their respective characters have remained. Upper Yemen is the north-eastern part of the country, and includes the regions called the Northern Mountains and the Northern Plateaux in this book. It is the stronghold of Zaydism, represented by the Zaydī *Sādah* (the *sayyids*, the noble families claiming direct descent from the Prophet), and its population is predominantly tribal, being the home territory of the two great and ancient tribal "confederations" of Bakīl and Ḥāshid.[16] It is, moreover, poorer agriculturally than much of Lower Yemen, largely because on the whole it receives much less rain. Lower Yemen, on the other hand, which covers the remainder of the country including the Central Plateaux, the Southern Mountains, the plain of Tihāmah and all of the former PDRY, is predominantly Shāfi'ī in terms of religious *madhhab* (legal School).[17] It also has its *Sādah*, though the majority of its inhabitants have been, historically at least, peasant farmers, rather than tribesmen. The boundary between Upper and Lower Yemen is generally placed somewhere between Ṣan'ā' and Dhamār. There have been periods in history when a Zaydī imām from Upper Yemen has exercised control over the agriculturally more prosperous Lower Yemen, as in the mid-sixth/

[16] The tribal confederations of Bakīl and Ḥāshid were known at least as far back as the fourth/tenth century, since they are described by the great Yemeni geographer and historian Abū Muḥammad al-Ḥasan al-Hamdānī (d. ca.336/947) (for example, *Jazīrat al-'Arab*: 97 and 115, where he is assigning tribes to Bakīl and to Ḥāshid, and *ibid.*: 239, where he is delimiting the areas covered by each of the two confederations). A detailed and penetrative study of the tribes and tribal politics of Upper Yemen, and of the perceived tension between the *Sādah* and the tribesmen, is Dresch 1993.

[17] Much of the northern part of Lower Yemen was ruled from 439/1047 for almost a century by the Ismā'īlī Ṣulayḥid dynasty, as has been mentioned above, and there is still a small population of Ismā'īlīs in the Manākhah area (to the west of Ṣan'ā').

mid-twelfth century, and yet other periods when a non-Zaydī ruler from Lower Yemen seized control of Ṣan'ā' and the Zaydī areas, pushing the incumbent Zaydī imām northwards, as happened briefly in the fifth/eleventh century under the Ismā'īlī Ṣulayḥids before they took up residence at Dhū Jiblah in Lower Yemen. Nevertheless, the distinction between Upper Yemen and Lower Yemen has remained as a living concept in the minds of Yemenis.

Since the early tenth/sixteenth century when the use of the Yemeni coffee plant began to be known in Europe, the strategic position of the Yemen at the mouth of the Red Sea has been of interest to the European powers. Before the nineteenth century and the great age of European imperial expansionism the European physical presence in the Yemen was largely confined to trading posts at Mocha (al-Makhā) on the Red Sea coast and Aden. In the nineteenth century however, and particularly after the opening of the Suez Canal in 1869 and the re-emergence of the Red Sea as the major route between Europe and India, the British extended their influence inland from Aden and finally declared Aden a British colony and South Yemen a British protectorate. The British position was consolidated further in the 1930s by the incorporation of the Ḥaḍramawt valley into the Protectorate. Meanwhile, in the mid-nineteenth century in North Yemen, the Ottomans were extending their influence southwards from the Ḥijāz and inland from the Red Sea coast, until by the beginning of the twentieth century a demarcation agreement between Britain and the Ottoman Empire was required to avoid conflict. The result was the 1904 joint border commission and the frontier the commission mapped between North Yemen and South Yemen was to last until the reunification of 1990.

The end of the First World War saw the final departure of the Ottomans from the North, which became a formally independent kingdom under the then Zaydī imām, Yaḥyā bn Muḥammad Ḥamīd al-Dīn, a descendent of the Imām al-Manṣūr al-Qāsim (*reg.* 1598-1620, the founder of the line of the Qāsimī imāms). Although he was never to achieve his desire to annexe either South Yemen or 'Asīr and Najrān, the Imām Yaḥyā did manage to consolidate his control over the whole of the North, including the Shāfi'ī areas. By the end of the Second World War, protest against his autocratic rule, and calls for reform of what remained an essentially medieval government and state, had grown ever stronger within the country. This dissent culminated in Yaḥyā's assassination in 1948. The reform government

which attempted to replace him was however very short lived, and his son Aḥmad succeeded in taking power as king and imām, with the help of the tribal elements of Upper Yemen. An attempt on Aḥmad's life in 1955 resulted in his suppression, often brutal, of reform-minded Yemenis, and it was not until his death in 1962 that a group of military and political reformers was able to strike with a coup d'état. With Egyptian military help, the new Yemeni republican government was able to force Aḥmad's son Muḥammad al-Badr, who had declared himself imām on the death of his father, into the northeast of the country. Despite material assistance from Saudi Arabia, Jordan and Iran in a civil war which lasted the rest of the 1960s, Muḥammad al-Badr was finally forced into exile and political obscurity in Britain in 1970 when a compromise solution establishing a broadly based republican government was achieved. Muḥammad al-Badr died in 1996, so bringing to an end the long (though not unbroken) line of Zaydī imāms which had been founded by al-Hādī in the late third/ninth century. Despite grave economic, social and political difficulties in the 1970s (two successive presidents were assassinated in 1977 and 1978), the Yemen Arab Republic achieved a large degree of stability from 1978 under the presidency of 'Alī 'Abdallāh Ṣāliḥ who now remains as president of the unified Republic of Yemen.

Meanwhile in South Yemen Britain had announced in 1965 its intention to depart within three years. The announcement provoked a bitter feud between rival factions in Aden for control of what would become an independent country. The party which eventually gained the upper hand, the National Liberation Front, moved rapidly to the Marxist left soon after assuming power and renamed the country the People's Democratic Republic of Yemen. Friction followed with North Yemen, which remained committed to a capitalist economy and good relations with the West, culminating in open war in both 1972 and 1979, and any hope that the two Yemens would eventually unite seemed to recede into improbability. However, the 1980s saw severe personal and ideological conflict emerge within the PDRY which erupted into a brief civil war in 1986. When Mikhail Gorbachev decided that the Soviet Union would no longer subsidise Communist régimes throughout the world, the PDRY leaders had to accept union with the YAR as the only alternative to national bankruptcy. Negotiations were started in 1989 and the two countries

merged officially in May 1990 as the Republic of Yemen.[18]

So profound have been the events of the last thirty years that no sector of Yemeni life has been left unaffected by them. The agriculture of the country has been influenced as much as other sectors. The fall of the Zaydī imām and the civil war in the North in the 1960s, the two wars in the 1970s between the North and the South, the internal political and economic problems in the South in the 1980s, the unification of the North and the South in 1990, and the expulsion of Yemeni workers from the Gulf States and Saudi Arabia in the aftermath of the Iraqi invasion of Kuwait—all these events have produced, in varying degrees, disruption and population movement, and their echoes will be sensed in the current sharecropping situation.

[18] An interesting and original critique of the social, economic, institutional and political development of the Yemen during the last four decades, which moreover goes a long way to explain how two states with so different histories as North and South Yemen could converge to unity, is the recent study by Sheila Carapico (1998).

PART I

SHARECROPPING AND ITS ISLAMIC DIMENSION

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CHAPTER TWO

SHARECROPPING IN CONTEXT

"The sharecropper has a sort of partnership and shares both profit and loss with his landlord."

Gaius (second century AD)[1]

2.1 INTRODUCTORY REMARKS

The purpose of this chapter is twofold. First, in Section 2.2, it will give a brief global survey of sharecropping, including an outline of the features that distinguish it from other forms of agricultural tenure and an indication of its rationale. Since the literature on the subject is so great in volume and so wide-ranging both geographically and temporally the works referred to here must be selective. Deserving special note are perhaps the studies of J. Pratt in Tuscany in the period 1850 to 1950 and A.K.S. Lambton in mid-twentieth century Iran.[2] In addition, T.J. Byres' useful collection of papers on sharecropping, which cover a wide global spectrum, will also be referred to.[3] Other references are noted as appropriate throughout the chapter.

The second purpose of this chapter is to show in general terms how Islamic law views sharecropping in order to provide a basis for more detailed discussion in subsequent chapters. Section 2.3 therefore introduces certain fundamental conceptual problems that arise in the Islamic context and the reasons for them, together with an overview of the Arabic terminology of sharecropping which, because of its multiplicity, is also listed for reference in Appendix 1.

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[1] Quoted by Ste. Croix 1981: 217.

[2] Pratt 1994; Lambton 1969. Lambton's study is of course not specifically of Iranian sharecropping but rather the agricultural situation on a much broader front. However, because of the great importance of sharecropping in mid-twentieth century Iran, her study is much concerned with the system.

[3] Byres (ed.) 1983.

2.2 THE ORIGINS AND RATIONALE OF SHARECROPPING

2.21 Sharecropping as a System of Agricultural Exploitation

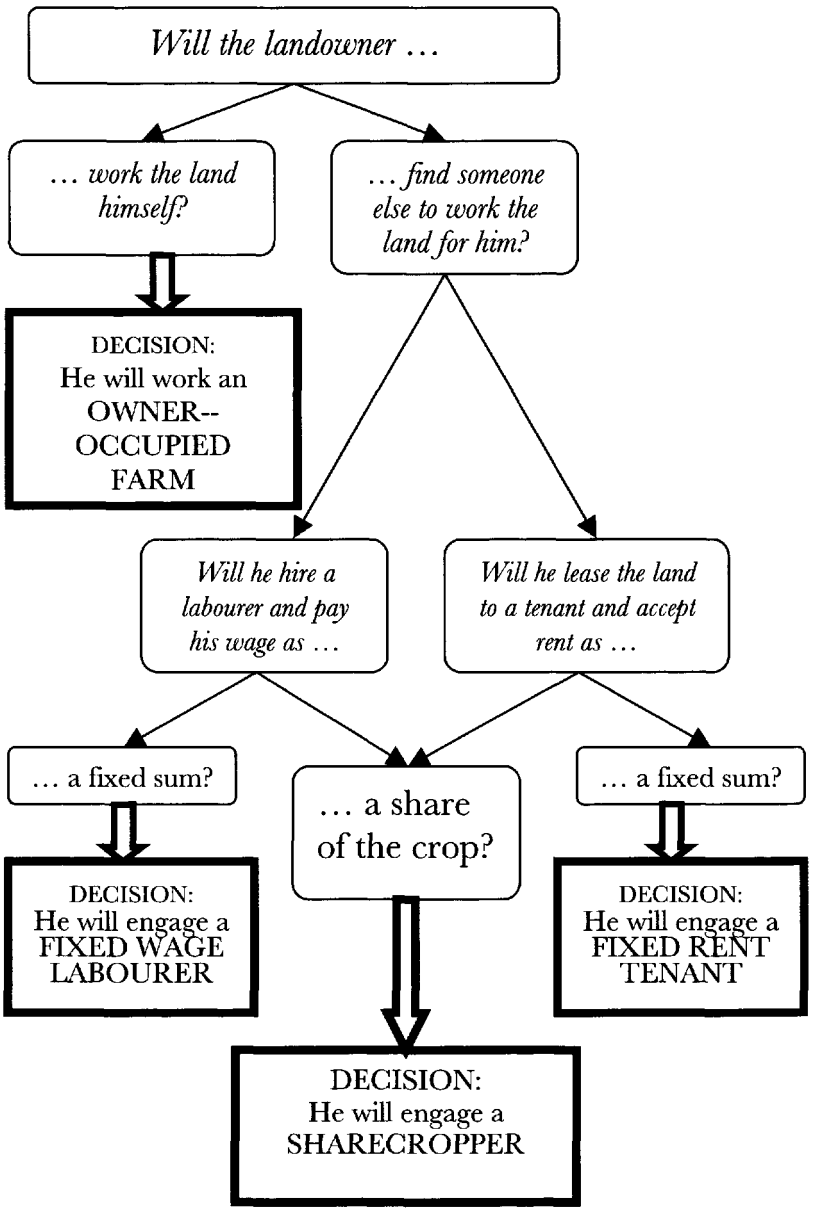
In terms of land tenure (that is to say, how land is held and worked) there are several combinations of choices that may be made to tap the agricultural potential. These are shown diagrammatically as a chart in Figure 2.1. First, the owner of the land must decide whether to work the land himself, in which case he will be an owner-occupier; or to allow someone else to work it for him. If the landowner selects the latter possibility, then he has a further decision to make. In the modern world (excluding the use of slaves, serfs or other forms of bonded labour) he is likely to have two choices here: (1) hiring a free labourer to work the land for him and paying the labourer a wage for his service; or (2) leasing the land to a tenant in exchange for the payment of a rent. In either case, the result may be viewed as belonging to one of two basic types, depending on the nature of the wage paid by the landowner or the rent paid by the tenant: fixed wages or rents on the one hand, and sharecropping wages or rents on the other.

In a fixed wage or rent situation the wage or rent is a stipulated value which will be quotable in absolute terms at the time the contract is drawn up (a fixed amount of cash or a fixed weight or volume of crops) and its size will not vary according to the size of the harvest.

In sharecropping on the other hand, the wage or rent is set as a proportion of the as yet unharvested crop (one-half, one-third, etc.). The absolute value of the rent cannot therefore be fixed at the time the contract is drawn up but only after the harvest has been gathered and measured.

Not only is this distinction between fixed wages or rents and sharecropping important in economic and social terms wherever in the world agricultural land is tenanted, but it is also crucially significant in Islamic law as will be shown later (in Section 2.3 below and in Chapter 3). Further, the difference is more important than another distinction often made—that between a wage or rent in kind (that is, paid in the crop itself) and a wage or rent in cash (either in advance, or else after the sale of the crop). The fixed wage or rent and the sharecropping wage or rent may both conceivably be paid in either cash or kind, depending on local customs and conditions (for example, how close the nearest market is, or whether there are itinerant merchants), and in any given situation much may depend in fact on the personal preferences of the parties involved.

Figure 2.1. Schematic representation of types of land tenure, as viewed from the landowner's standpoint


Will the landowner ...
... work the land himself?
... find someone else to work the land for him?
DECISION: He will work an OWNER-OCCUPIED FARM
Will he hire a labourer and pay his wage as ...
Will he lease the land to a tenant and accept rent as ...
... a fixed sum?
... a share of the crop?
... a fixed sum?
DECISION: He will engage a FIXED WAGE LABOURER
DECISION: He will engage a FIXED RENT TENANT
DECISION: He will engage a SHARECROPPER

Sharecropping is undoubtedly an extremely ancient method of agricultural exploitation in its origin and one which continues in many areas of the world down to the present day. The share taken by the landowner is typically one-half of the harvested crop, though in practice his share varies considerably with local conditions as will be shown later in this chapter. In addition, it would seem usual for the landowner to receive from the sharecropper dues and services over and above his stipulated share of the crop, and this is another aspect which will be taken up below.

The system has attracted a very large literature since Adam Smith, the founder of modern economics, first analysed it critically in the second half of the eighteenth century.[4] As will be seen, many of the studies of the system as it currently operates or has historically operated have shown that the sharecropper is disadvantaged relative to the landlord, and it has attracted criticism from some economists, historians, anthropologists, sociologists and others for this reason. Nevertheless, it has never been conclusively proved that disadvantage to the sharecropper is a result inherent in the system itself, and indeed under certain conditions it can be shown to have theoretical and practical advantages over fixed rent tenure for both the tenant and the landowner.

2.22 A Brief World View of Sharecropping

Sharecropping is known to be of very ancient origin and has been found in widely separated parts of the world. From the historical evidence it is known that forms of sharecropping existed in both Greece and India as early as the fourth century BC and in parts of China it may already have been established as early as the eighth century BC.[5] Sharecropping certainly existed in the Roman Empire in the second century AD as *colonia partiaria*.[6] The system had emerged (or perhaps rather had re-emerged) in France and Italy by the ninth century, while by the thirteenth century it had become the dominant form of agricultural tenancy over much of these two countries as respectively the *métayage* and *mezzadria* systems.[7] In the Middle East,

[4] Smith 1776: 391 *et passim*.
[5] Byres 1983: 9 and 11.
[6] Ste. Croix 1981: 214 and 216-17.
[7] Pratt 1994: 1 and 31; Duby 1968.

the system seems to have been already established in Egypt by the third century BC[8] and in Persia by the time at least of the Sasanid dynasty (AD 226-651).[9] For the Yemen there appears to be enough evidence to indicate that sharecropping existed well back into the pre-Islamic period when, moreover, much of the local terminology in use today may well have originated.[10]

In more recent periods, sharecropping remained the dominant system in parts of China until the advent of communism in 1947 and in Italy and Turkey until the land reforms of the 1950s in these countries. In large areas of India and elsewhere in Asia and also in much of southern Europe it persists until the present day.[11] Perhaps most infamously, the system became widespread in the southern states of the USA after the Civil War (1861-65) and lasted until President F.D. Roosevelt's New Deal of the 1930s put an end to its worst injustices.[12]

Several theories have been put forward by economists and others to explain the reasons why and the courses by which sharecropping emerges and is perpetuated in some regions but is absent or is abandoned in others. For example, the suggestion has been made by some researchers that sharecropping appears as a transitional phase between two other economic systems—for instance, transitional between a slave system and a serf system, or between a slave system and a wage labour system.[13] Another suggestion is that the appearance and disappearance of sharecropping is to be associated with cycles of economic activity. For example, in a persuasive consideration of sharecropping in Turkey during the last seven decades of the Ottoman Empire and the first three decades of the Republic, Ç. Keyder shows how its cyclic appearance and disappearance can be related to world economic booms and slumps in agricultural commodity prices.[14]

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[8] Rostovtzeff 1922: 77-79.

[9] Lambton 1969: 206.

[10] Al-Sharjabī 1990: 150-51 and 154-57. Further, as is noted in Appendix 1 which lists the Arabic terms for sharecropping, several of the terms are probably directly connected with terms found in pre-Islamic Sabaean inscriptions.

[11] Byres 1983: 25-30.

[12] Conrad 1965; Agee 1965.

[13] See for example Byres 1983: 12-13; and Cooper 1985: 146.

[14] Keyder 1983.

Interesting though these and other theories are, discussion of them lies beyond the scope of this present work. What may be observed here from the large literature on the subject is that there would appear to be a strong tendency for sharecropping to be found in areas or during periods in which there exist either or both of two conditions, and to be absent or to disappear when neither condition is found. These general conditions are: first, the presence of a certain degree of risk to crop yields caused by economic or physical constraints (for example, falling agricultural prices, or land which is agriculturally marginal due to unreliable rainfall or poor soils); and second, a high labour to land ratio (that is, situations where labour is plentiful but agricultural land less so).[15]

Whatever the global applicability or analytical utility of these summary conditions, it may certainly be noted that the regions in which the system can currently be found or has recently been found are often characterised by thin soils and dry-farming techniques in which agricultural yields are particularly sensitive to climatic vagaries. Falling into this category are for example parts of southern France and much of central and southern Italy, and indeed both shores of the Mediterranean area more generally, and additionally the drier grain and cotton lands of the southern states of the USA, the high veld of southern Africa, and much of Iran, Turkey and most other countries in the Middle East, including much of the Yemen.[16] In contrast, in regions with wetter climate and more predictable crop yields, sharecropping tends not to exist, or has existed only ephemerally: in north-western Europe for example it seems never to have been found except

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[15] Both these conditions are consistent with, for example, Keyder's analysis of sharecropping cycles in late Ottoman and early Republican Turkey (see Keyder 1983, especially 132 and 137). Further, both also apply in the case of the Yemen, the subject specifically of Part II of this present work.

[16] There have been a great many detailed studies of sharecropping carried out by modern researchers specialised in a variety of fields. The following is a very small sample: Pratt 1994 (central Italy); Gill 1983 (Tuscany); Conrad 1965, Reid 1973 and Mandle 1983 (all concerning the southern states of the USA); Keegan 1983 (the South African high veld); Lambton 1969 (the agricultural situation, including sharecropping, in Iran in the mid-twentieth century); Keyder 1983 (late Ottoman and early Republican Turkey); Halim 1983 (western Malaysia); Cooper 1983 and, in greater detail, Cooper 1988 (both dealing with Bengal in the period 1930-1950); and Sharma and Drèze 1990 (Palanpur, Northern Gujerat, India). Several other studies deal specifically with former French colonial North Africa, including Milliot 1911, Rectenwald 1930, Abribat 1934, Roussier-Théaux 1935, and Noël 1938, and discussion of some aspects of their works will be taken up later. Some facets of the case of the Yemen are the subject of especially Part II of this present work.

in isolated areas (Artois, Hainault, and some locations in western Prussia) and then only briefly.[17]

Nevertheless, the above statements are by no means intended as deterministic, and it can perhaps be misleading to generalise about the reasons for the presence or absence of sharecropping as a system of agricultural tenancy over such a vast temporal and geographical range. Further, it must be noted that there exist a number of different forms of sharecropping, depending on the amount of investment contributed by the sharecropper (a subject which will be taken up below in Sections 2.23 and 2.24), or on the type of crop involved (whether it is, for example, an annual arable crop, or a perennial tree crop, a point which will also be shown to be of significance later in this present work). In short, it may well be that no explanatory model to fit all occurrences can be devised and that beyond a few broad generalities each incidence is the result of unique economic and physical circumstances. In any case, such questions, though fascinating, are not the concern of this study. Discussion here will instead centre rather on two issues regarding the characteristics of the system which are commonly remarked on by researchers. Both have to do essentially with the relationship between the landowner and the sharecropper, and both are of significance in the case of the Yemen as will be shown in Part II below. The first concerns the proportions of the crop accruing to the landowner on the one hand and the sharecropper on the other. The second concerns the extent to which the sharecropping system may be beneficial or detrimental to the sharecropper.

2.23 The Division of the Crop between Landowner and Sharecropper

In sharecropping systems the most common division of the crop between landowner and sharecropper is theoretically on a 50:50 basis, as is suggested by the terms for the system in French and Italian *métayage* and *mezzadria*, and also the terms in other European languages in areas where the system has been historically found (*Halbpacht* and *helftwinning* in medieval western Prussia and the Netherlands respectively).[18] This equal division is by no means universally applied

[17] Byres 1983: 17-18.

[18] In the French and Italian terms the *méta-* and the *mezza-* are ultimately from the Latin *medietas*, "half". Similarly, *Halb* and *helft* mean "half" in respectively German and Dutch.

however, even in the areas where such terms implying a half-share are used. In certain areas at certain times the landlord's share of the crop may be only one-quarter or less, or as high as three-quarters or more. In point of fact, a large variety of proportions have been reported throughout the world and over the centuries according to differences in local environmental and economic conditions. Thus, for example, Georges Duby, speaking of the situation in southern France in the twelfth and thirteenth centuries, says that the *métayage* contract

> gave the master a widely differing share in the produce according to the quality of the soil and the condition of the 'farmer': sometimes it gave him two-thirds of the crop, more often a half or a third, but occasionally much less, especially when the soil was not very fertile. In 1338 the Provençal Hospitallers were unable to find a peasant willing to take [and] farm certain land on their demesne, even when he was offered nineteen-twentieths of the produce to keep for himself.[19]

So—here was a landlord offering the sharecropping peasant practically the whole crop, and yet the peasant was free to reject the offer! This point should be borne in mind in later discussion (Section 2.24 below) when the fairness or otherwise of the system to the sharecropper is examined.

In practice, the division of the harvest between landowner and sharecropper may be achieved in one of several ways. The allocation of the landowner's share may be made after the crop has been gathered and measured by dividing appropriately the total volume or weight of the harvest. If the crop is a cash crop grown for sale in a local market or to itinerant merchants, the landlord's share may be allocated by dividing the cash value received from the sale. Alternatively, the division may be made during the gathering process itself, by allocating every *n*th unit (every *n*th sheaf of corn or every *n*th basket of fruit, and so on) to the landowner. So for example in a 50:50 arrangement every second unit gathered would be assigned to the landowner, while if the landowner's share is one-third of the crop, then he would be allocated every third unit. Another method is for the landlord and sharecropper to take their respective shares from different parts of the land, a method apparently practised in the Ḥijāz at the birth of Islam and one which will be referred to later when the Islamic Traditions that deal with sharecropping are examined (Chapter 3, Section 3.3, below).

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[19] Duby 1968: 275.

One factor that undoubtedly affects the proportions of the two parties' shares is the nature of the physical environment of climate and, as Duby indicates in the quotation cited above, the fertility of the soils. Generally speaking, the more marginal the area is for crop production the larger will be the share allotted to the sharecropper. The rationale behind this is presumably that in areas where soils are poor or where water resources are either small or highly variable from year to year, agricultural yields will be low either every year or in a large proportion of the years. A sharecropper in such an area will not survive very long if year after year too large a part of each harvest is given up to the landlord. Although the landlord will profit in the short term by taking an unsustainably large a share for himself, in the long run the failure of his sharecroppers will harm him too.

Another important influence that can affect the amount of the crop the sharecropper actually receives is the way in which any government tax due on the crop is deducted. In some systems of sharecropping the tax due is deducted from the total harvest before division into shares. This is equivalent to each party contributing to the tax payment a share proportional to his share of the harvest. In other systems, either the landowner or the sharecropper will be liable to pay the tax on the total harvest from his respective share. Clearly, the method by which the tax is deducted can affect the real shares received by the two parties as opposed to their theoretical shares.

A more fundamental influence on the size of the shares received by the landlord on the one hand and the sharecropper on the other concerns the provision of the agricultural inputs. The size of each share of the harvest can sometimes be seen to reflect the respective contributions supplied by the two parties. In the case of grain land these inputs may include the seed, the water, and the animals, tools and machinery needed for ploughing the soil and harvesting the crop and then transporting it and threshing it, and so on. In the case of perennial plantings, such as orchard trees or grape-vines, the ownership of the trees or shrubs can be considered an input: they may belong either to the landowner or to the sharecropper. The landowner may provide, in addition to the land itself, any or none of these other inputs, while the sharecropper, in addition to his labour and possibly also the labour of his family, may similarly provide any or none. Generally speaking, the more of these inputs either party contributes the larger will be his share of the harvest, though there is rarely any exact or regular relationship in practice.

An extremely systematised application of this principle has been recorded by A.K.S. Lambton in her study of agricultural tenure in mid-twentieth century Iran. In Lambton's words,

> Traditionally, five elements are taken into account in dividing the crop: land, water, draught animals, seed, labour: theoretically one share [of the crop] is allotted to each element and goes to whoever provides that element.[20]

So, for example, a landlord who provides only the land and the water (that is, two of the five inputs) would theoretically receive two-fifths of the crop, leaving the remaining three-fifths for the sharecropper who will have supplied the other three inputs of draught animals, seed and labour. Conversely, a sharecropper who supplies nothing but his labour would receive only one-fifth of the crop, leaving four-fifths for the landlord.

As Lambton indicates however this neat pattern is hardly more than a theoretical abstraction, and she found in her fieldwork that in practice a huge variety of different systems of crop division existed in Persia, including 50:50 division and instances where the landlord's share is as much as two-thirds or four-fifths, even when he supplied no more than the land and the seed.[21] Moreover, she points out that the sharecropper must typically provide a number of extra dues and services for the landlord over and above the latter's contracted share of the crop. These extra dues and services might include transporting the landlord's share to the granary, labour service in building roads and irrigation works, "gifts" of various produce (clarified butter, hens, eggs, and so forth), and a number of other unremunerated services or goods.[22]

Both in the variety of crop division systems and in the sharecropper's provision of a range of additional services and goods to his landlord, Lambton's Persia is by no means exceptional. In fact, it would seem to be something of a rule that a sharecropper is bound to render the landlord various extra obligations, whether these are stipulated in the contract or not. Such for example was the case with the sharecroppers of central Italy before 1950, as reported by J. Pratt in his detailed study of them. In addition to handing over half of the agricultural product of their labour, there existed "a range of other

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[20] Lambton 1969: 306.
[21] *Ibid.*: 308-09.
[22] *Ibid.*: 330.

possible obligations: to provide accommodation or hospitality when [the landlord] visited, or to supply some days' labour each year on road building and estate maintenance, a practice similar to corvée labour".[23] Such "supplementary" services are also found in Yemeni sharecropping, though, it would appear, they are not particularly onerous, as will be seen (Chapter 7, Section 7.42, and Chapter 8, Section 8.2). In any case, as will also be shown, it is surprisingly difficult to determine in the Yemen what, in practice, are the contractual obligations properly speaking, in contrast to such "supplementary" burdens.

2.24 Does Sharecropping work to the Benefit or Detriment of the Sharecropper?

Among modern researchers views on the economic and social benefits of exploiting agricultural resources by the sharecropping system have tended to polarise between those who, like the eighteenth century founder of modern economics Adam Smith, hold that the system benefits the landowners as the dominant class to the detriment of the sharecroppers' interests,[24] and those who, like the nineteenth century philosopher John Stuart Mill, maintain that, under certain historical, economic and geographical circumstances, the system is the best geared to benefit all parties involved.[25]

Those observers and analysts of sharecropping who are generally supportive of the system have viewed sharecropping agreements as partnerships arrived at by bargaining and as such the system is claimed to benefit both parties.[26] In the idealised system the landlord supplies the land and the sharecropper the labour, and both are equally recompensed with a half share of the harvest. If the harvest is large, the rent will be large. If the harvest is small or non-existent, then the sharecropper will have to hand over only a small rent or no rent at all. As Gaius put it in the second century AD, "the share-

[23] Pratt 1994: 41

[24] Smith 1776: 391.

[25] Mill 1848: 185. Pratt (1994: 49) makes the interesting point that this polarisation of views of sharecropping as on the one hand the bane of the peasantry and on the other their beneficiary was neatly reflected in the context of Italy during the Fascist period.

[26] See for example, Mandle (1993: 123) who summarises this view (though rejecting it).

cropper [*colonus partiarius*] has a sort of partnership and shares both profit and loss with his landlord".[27]

Such is the theory, at any rate—though as has been indicated above this model situation of reward proportional to input by no means always applies. Many critics of sharecropping have indeed pointed out that even if the system is viewed as a partnership it is rare for it to be other than a partnership between grossly unequal partners.[28]

There is no doubt that many studies of sharecropping show that landlords do hold the dominant position in the relationship and their dominance is frequently to the detriment of the economic and social interests of the sharecropper, sometimes to the extent of total dependence. G.E.M. de Ste. Croix points out that although in a poor harvest a sharecropper would have to give his landlord only a small rent, he would also himself go short of food, and if poor harvests continued over several years, he would eventually become as much at the mercy of his landlord as would a fixed-rent tenant who defaults.[29] Ste. Croix is speaking here in the context of the Roman Empire of the second century AD—but his observation might be applied much more generally. In medieval France, for example, Duby describes sharecroppers' hardship very similarly: because of lack of security of tenure, he says, sharecropping contracts "seem to have held the defenceless peasantry ... tightly in a net of economic dependence".[30] Lambton, in the context of mid-twentieth century Persia, has equally observed that "in general the scales are weighted in favour of the [landlord], and little or no protection is afforded to the tenant".[31] Many other similar examples of what some writers have referred to as the "web of dependence" suffered by sharecroppers might be quoted for many regions in many periods. Perhaps most vividly of all, at least in the consciousness of the English-speaking world, largely as a result of the highly graphic fictional writings of American authors of the interwar years, such as John Steinbeck and Erskine Caldwell, and also the powerful photo-documentary work of James Agee and Walker

[27] Quoted by Ste. Croix 1981: 217.
[28] Cf. Byres 1983: 13.
[29] Ste. Croix 1981: 217.
[30] Duby 1968: 327.
[31] Lambton 1969: 306.

Evans, is the plight of the sharecroppers of the southern states of the USA in the 1920s and 1930s.[32]

The argument of the critics of sharecropping, then, would seem to be that because there are many examples of sharecroppers in situations of great hardship and dependence on their landlords, the reason must be the sharecropping system itself. It is surely easy to see the flaw in this assertion. While it is undeniable that some sharecroppers in certain areas and at certain times have been exploited by ruthless landlords, it is by no means proved that this is the result of the sharecropping system *per se*. There are at least four reasons for supposing this. First, many examples could be quoted of dependent and indebted agricultural workers under agricultural systems other than sharecropping. Second, the vagaries of climate and of economic cycles must be held responsible in many cases of sharecropper misery. Third, under a sharecropping system the interests of the landlord and of the sharecropper are to a large extent interdependent. Fourth, examples exist where the relationship between the landowner and the sharecropper is truly a mutually beneficial partnership in practice as well as in theory.

That sharecropping as a system does not necessarily work wholly to the detriment of the sharecropper is brought out clearly by J. Pratt in his detailed study already cited of the *mezzadria* of central Italy before the land reforms of 1950.[33] Although agricultural life under the system was physically hard for the sharecropper and his family, the sharecropper existed materially on a much better level than certain other societal strata, notably the day-labourer. It is true that the landlord took half of almost all the produce of the farm and might exact in addition a range of other obligations from the sharecroppers, such as labour for estate maintenance, but the produce of the kitchen garden and the farmyard at least were exempt from the 50:50 division and belonged wholly to the farmer's family.[34] The day-labourer, on the other hand, had no such exempt reserve.

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[32] See, for example, John Steinbeck's novel *The Grapes of Wrath* (1939), in which the Joad family, reduced to sharecroppers on land they once owned, are finally driven from Oklahoma when the new landowners, the banks, decide to introduce mechanised farming; similarly, several of the novels, stories and plays of Erskine Caldwell, such as *Tobacco Road* (1932), set among sharecroppers in Georgia; also Agee 1965; and Conrad 1965.

[33] Pratt 1994.

[34] *Ibid.*: 41.

Further, again according to Pratt, although the Tuscan landlords as a whole attempted deliberately to exclude sharecroppers from the market and the money economy, and although, moreover, they could and sometimes did evict their sharecropping tenants, nevertheless sharecroppers equally had the power to seek out better landlords and better farms. Given that much of the work on farms consisted of investments such as terracing, planting olives and vines, "work which would generate no product for five or ten years, ... the long term productivity of the farm therefore depended on the investment of labour by the share-croppers, and this was often stipulated in the contract, but it was unlikely to be performed satisfactorily if there was constant uncertainty about the tenancy".[35] To avoid evicting his sharecroppers if at all possible was therefore in the landlord's own interests.

Additionally, one may note instances of sharecroppers with a certain autonomy of choice, which could not exist if dependency and indebtedness were inherent in the system. An historical instance has already been quoted above of landowners in thirteenth and early fourteenth century Provence receiving a much smaller share of the crop on infertile land and the ability of peasants to refuse to take on sharecropping tenancies when it did not suit them, even when they could keep all but one-twentieth of the crop.[36] Similarly, Pratt observes in the context of central Italy that "share-croppers could and did seek out other landlords to find better farms".[37]

In short, Pratt's picture of the condition of sharecroppers in central Italy in the late nineteenth and early twentieth century resembles far more that of the Provençal sharecroppers of around AD 1300 than it does, for example, Agee's portrayal of the sharecroppers of the southern states of the USA during the same period.[38] In other words, there would seem to be no reason to suppose that the sharecropping system is inherently disadvantageous to agricultural tenants' interests. Indeed, given fair landlords, the system conceivably has considerable advantages for tenant farmers in areas where for climatic, pedo-

[35] *Ibid.*: 39.
[36] Duby 1968: 275.
[37] Pratt 1994: 35.
[38] In any case, the primary causes of the plight of American sharecroppers in the interwar period can be more satisfactorily explained as the result of a fatal combination of drought, soil exhaustion and world economic slump, rather than wicked landlords and merchants.

logical, economic or other reasons the level of risk in farming is high. This is because a sharecropping rent, unlike a fixed rent, is by definition directly related to the size of the harvest. After a large harvest, the sharecropper will have to hand over to his landlord a large rent in absolute terms, though the share he retains will also be large in absolute terms. A small harvest, on the other hand, will mean that the sharecropping tenant pays only a small rent, while a complete failure of the harvest will mean that he pays no rent at all. The system is therefore potentially fairer to the tenant's interests in areas of fluctuating harvests.

In fact, this is a very idealised picture, and in practice other factors come into play. Ste. Croix, for example, observes that the size of a tenant's holding would be important in whether he survived or not during difficult years of poor or non-existent harvests, and he rightly points out that this is often overlooked.[39] Further, as will seen in due course (in Section 2.3 below, and in Chapter 4), if the sharecropping contract is viewed not as one in which the sharecropper is leasing the land as a tenant, but rather as one in which the landowner is hiring the sharecropper as a labourer (as Islamic jurists of the Shāfi'ī School theoretically regard it), then in a year when the harvest fails the sharecropper will be placed in the invidious position of having worked for no wage. But however the contract is viewed, even the ideal situation depends on landlords acting fairly towards their sharecropping tenants. Although of course fair-minded landlords can never be guaranteed, proscribing practices which are potentially unfair to sharecroppers would seem to be a central concern of how Islamic law regulates sharecropping contracts, and it is this matter which will now be considered.

2.3 Islamic Aspects of Sharecropping

2.31 Sharecropping as viewed in Islamic Law

Sharecropping in the Islamic context has been the subject of a large literature over the centuries. From a random glance over the multitude of works of *fiqh* (Islamic jurisprudence) it would seem that practically every Islamic authority has pronounced on the matter. This

[39] Ste. Croix 1981: 217.

has been largely because the system has always been problematic in Islam since it involves *gharar* (risk) and can lead to *ribā* (unjustified profit), both of which are forbidden in Islamic contract law. Examples of what the writers of *fiqh* have to say about sharecropping of particular relevance to the Yemen are studied in Chapters 4 and 5. This Section serves only as an introductory overview of some of the relevant concerns.

A major instance of *gharar* in a contract is the failure to specify certain essential elements, and as a result of such omission the contract would be annulled by being declared *fāsid* (defective) or *bāṭil* (invalid), depending on the precise nature of the omission. The elements requiring specification vary with the type of contract. *Bayʿ* contracts (contracts of sale), for example, that do not specify the date on which payment for goods will be made are theoretically invalid, since such contracts could lead to speculation and *ribā*.[40] So too are *bayʿ* contracts and also *ijārah* contracts (contracts of renting, hiring or leasing) which involve goods that are not present at the time the contract is concluded, since this is another of the requirements to make a sale or leasing contract valid: the object of the sale or lease must be present and therefore visible for inspection. Examples of such invalid contracts are the sale of fish or other animals which have not yet been caught, and the contract called *ḥabl al-ḥablah*, the sale of an animal while it is still in the womb.[41]

As will be mentioned below, sharecropping contracts are frequently regarded as *ijārah* contracts and ostensibly they may be construed as invalid on both the above counts according to the strict interpretation of the rules for *ijārah* contracts: the date of payment cannot be precisely specified in the contract since the date of the harvest will not be exactly known; and the exact value of the rent cannot be specified since the harvested crop is not present at the time the contract is made.

Sharecropping, as a form of *ijārah*, is often defined in Islamic law in the following terms: Renting land for a part of its produce, or hiring a

[40] There are, it is true, a few exceptions where jurists allow a limited degree of indetermination in *bayʿ* contracts, but in general, in Rayner's words, "Any degree whatsoever of uncertainty in the payment of the price renders the contract null and void" (Rayner 1991: 357).

[41] Rayner 1991: 153; Khan 1976: III, 199 n.1.

labourer for part of the produce of the land.[42] That is to say, if a sharecropping contract is considered as a type of *ijārah* it can be viewed in two different ways, depending on what it is that is being rented or hired, as was illustrated schematically in Figure 2.1 above. If the contract is seen as the sharecropper leasing the land as a tenant, then the landowner's share of the crop will be the *ujrah* (rent). If on the other hand the contract is viewed as the landowner hiring the sharecropper as a labourer, then the latter's share of the crop will be his *ajr* (wages). In both cases however the rent or wage will be defined in terms of a share of what is produced from the land at the time of the future harvest—which, by definition, cannot be known at the time the contract is drawn up: hence the problematic *gharar*.

Alternatively, some Islamic jurists (notably those of the Mālikī School) have viewed sharecropping as a *sharikah* or *shirk* (partnership contract) on the grounds that it resembles another kind of contract called *muḍārabah*. A *muḍārabah* contract is a permitted profit-sharing commercial partnership in which one partner supplies the capital and the other the time, skill and effort to invest it, and in which, contrary to the rules governing *ijārah*, there is no alternative but to specify the share of the profit (*ribḥ*) taken by each partner as a proportional share since a *ribḥ* which is defined as an absolute sum or quantity is not possible in a *muḍārabah* contract.[43] If sharecropping contracts are so viewed, then the problem of undefined terms and objects not present disappears. However, other difficulties still remain which have prevented even Mālikī jurists from unanimously allowing sharecropping in all circumstances.

These points will be taken up in more detail in Chapter 3 and elsewhere in this book. To conclude this brief overview of the Islamic aspects of sharecropping it is appropriate now to introduce the somewhat complex Arabic terminology of the subject and in so doing to

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[42] تأجير الأرض بما يخرج منها أو تأجير العامل بما يخرج من الأرض *ta'jīr al-arḍ bi-mā yakhruj min-hā aw ta'jīr al-'āmil bi-mā yakhruj min al-arḍ* (lit. "The leasing of land against what is produced from [the land], or the hiring of a labourer against what is produced from the land"). This is the Shāfi'ī formulation as quoted by al-Jazīrī (1969: 17), though in fact as will be discussed later (Chapter 4, Section 4.2, below) al-Shāfi'ī's *Kitāb al-Umm* regards as valid only the second possibility: that is, the hiring of a labourer. However, other authorities, including the Yemeni Civil Code (*al-Qānūn al-Yamanī*), make a more subtle three-part distinction, as will be shown in Chapter 3 (Section 3.5).

[43] Schacht 1964: 156-57; Wakin *EI*², article "*Muḍāraba*".

explain the distinctions Islamic law makes in regarding different types of sharecropping.

2.32 The Islamic Terminology of Sharecropping

There exists a complex profusion of Arabic terms for Islamic sharecropping contracts. Part of the terminological multiplicity results from the fact that early Islamic sources distinguished between sharecropping in different agricultural situations, such as sown grain land on the one hand and tree crops which require irrigation on the other, or between different contracts according to which party supplies which of the necessary inputs such as seed corn and agricultural implements. Another part of the reason is regional differences. Regional differences as they concern the Yemen will be considered later (Chapter 6, Section 6.3, and Chapter 7, Section 7.2). The purpose of this present section is to give an overview of the terminology found in the Islamic legal sources, since it is virtually impossible to discuss the subject without some understanding of the different terms.

In the literary sources the most commonly found terms for sharecropping contracts are *mukhābarah*, *muzāraʿah*, *mughārasah* and *musāqāh*.

Mukhābarah is a general term found in the *ḥadīth*s (the Traditions which relate the *Sunnah*, the practice of the Prophet) and in the legal works. Its etymology is not entirely clear. It is often assumed that it derives from the place name Khaybar, since it was at this oasis, some 90 miles (145 km) north of Medina, that the Prophet entered into a crop-sharing agreement with the resident Jews.[44] Other suggestions are that it comes from either *khabīr* ("cultivator", in this context), *khabār* ("soft land") or *khubr* ("a share").[45]

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[44] For the historical event see Veccia Vaglieri *EI*^{2}, article "Khaybar"; and Watt 1956: 217-19 and 256-57. The relevant *ḥadīth*s are: al-Bukhārī *Ḥadīth*s 521, 522, 524 and 531; these are discussed in due course (Chapter 3, Section 3.3, below).

[45] According to several sources, *khabīr* (lit. expert) in this context means *akkār*, *ḥarrāth*, *zarrāʿ* and *fallāḥ*, that is, ploughman or cultivator, and the derivation of *mukhābarah* from this term has been suggested by al-Shawkānī (*Nayl al-Awṭār*: VI, 8), and by the author of a Ḥaḍramī treatise on sharecropping, the Bā Kathīr Ms. (2_{20}). See also Lane 1863-93: 695b (under the Form III verb *khābara*) where the root verb *khabara* is cited as meaning *inter alia* to plough.

Khabār, soft land (and probably therefore by extension, arable land): the derivation of *mukhābarah* from this term has been suggested by al-Shawkānī (*Nayl al-Awṭār*: VI, 8), and by al-Jazīrī (1969: III, 3). Cf. Lane 1863-93: 696b.

Muzāraʿah (the Form III verbal noun from the same root as *zarʿ* which can mean either sowing, or grain, or cultivation especially though not necessarily with grain) is also found in the legal texts and although its etymology refers specifically to sharecropping contracts on land sown annually, the term is also used to mean sharecropping more generally as a synonym for *mukhābarah*. A distinction between *muzāraʿah* and *mukhābarah* is sometimes made, though not universally held: *mukhābarah* is where the tenant's share is defined as the crop from a specific plot of the land.[46] Alternatively, *mukhābarah* is often distinguished from *muzāraʿah* on the basis of which party provides the seed: in the former the seed is provided by the cultivator, while in the latter it is supplied by the landowner.[47] For example, the Shāfiʿī jurist al-Nawawī makes precisely this distinction in his *Minhāj al-Ṭālibīn*, a work to be studied in more detail in Chapter 4 below,[48] and according to some sources Aḥmad bn Ḥanbal (d. 241/855, after whom the Ḥanbalī legal School is named) distinguished the two contracts in the same way.[49] Such a distinction is not however held by other authorities, including al-Shāfiʿī himself,[50] a fact commented on by al-Shawkānī.[51]

Both *mughārasah* and *musāqāh* are also widely found legal terms. *Mughārasah* (the verbal noun of the Form III verb from the same root as *ghars*, plants and planting, especially in relation to trees and shrubs[52]) is sharecropping in land planted with perennial crops (typically orchards and vineyards), while *musāqāh* (the verbal noun of the

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Khubr, a share: al-Shawkānī (*Nayl al-Awṭār*: VI, 8) suggests this term as the derivation of *mukhābarah*. Cf. Lane 1863-93: 696a.

Additionally, Serjeant (1964: 62 n.110) tentatively connects the term *khubrah* with *mukhābarah*. According to him, a *khubrah* in the context of Ḥaḍramawt is a basket-cover placed over ripening dates. It would perhaps seem unlikely that the widespread and well-known term *mukhābarah* should derive from a local Ḥaḍramī word such as this. One or other of the derivations suggested by al-Shawkānī and others, as indicated above, and perhaps especially *khubr* (a share), would appear much more likely.

[46] For example, the Yemeni Civil Code *al-Qānūn al-Madanī*, which will be studied in detail in Chapter 3 (Section 3.5), defines *mukhābarah* in this way (*al-Qānūn al-Madanī*, Explanatory Note to Article 739).

[47] Al-Jazīrī 1969: III, 5; Siddiqi 1976: III, 815 fn.1998. Cf. Van Den Berg 1896: 93 n.3. See also Young *EI*^{2}, article "*Muzāraʿa*".

[48] Al-Nawawī *Minhāj al-Ṭālibīn*: II, 143_{4-6}.

[49] Bā Kathīr Ms.: 8_{2-4}.

[50] Al-Shāfiʿī *Kitāb al-Umm*: VII, 101.

[51] Al-Shawkānī *Nayl al-Awṭār*: VI, 8-9.

[52] Cf. Lane 1863-93: 2247a-b, entry *gh-r-s*.

Form III verb from the same root as *saqy*, irrigation) is sharecropping on land requiring irrigation (typically date-palm plantations). Both therefore involve perennial crops and are thus clearly distinguished from the *mukhābarah* and *muzāra'ah* proper (though as has been noted above, both these latter terms are sometimes used more generally to include all kinds of sharecropping).

The essential distinction between *mughārasah* and *musāqāh* is usually that in the *mughārasah* contract, the sharecropper is leasing the landowner's land as a tenant, whereas in the *musāqāh*, the landowner is hiring the services of a sharecropper as a labourer. This may seem an unnecessary theoretical distinction, and in practice it often counts for little: so much so, in fact, that the Ottoman Land Code combines both these contracts together, ignoring any valid differences there might be between them.[53] Nevertheless, there is one practical distinction frequently made which is of importance. In the *musāqāh*, the trees almost invariably belong to the landowner and will typically be already mature enough to bear fruit in the season to which the contract applies. In the *mughārasah* however it will often be the responsibility of the sharecropping tenant not only to tend the trees but also to plant them (hence such a tenant is frequently referred to as the *ghāris*, the planter), and moreover to supply them as saplings (*ghars*, pl. *aghrās*) or palm-shoots (*fasīlah*, pl. *fasā'il*; or *maqla'*, pl. *maqāli'*). The operation of this kind of *mughārasah* contract will be mentioned again in greater detail in the context of Mālikī North Africa in Chapter 3 (Section 3.4).

Two further terms—*muḥāqalah* and *kira' al-arḍ*—deserve mention since they are also used in the collections of *ḥadīth*s and the early legal works of the jurists in the context of sharecropping.

Muḥāqalah (the verbal noun of the Form III verb from the same root as *ḥaql*, field) has two different meanings in the *ḥadīths* and the early legal works. First, the term can mean the sale of grain while it is still growing, a type of transaction which Islam prohibited, and this is the meaning usually attributed to it in modern legal works.[54] Second,

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[53] Roussier-Théaux (1935: 132 n.4) makes this same point. For an annotated English translation of the text of the Ottoman Land Code and related Ottoman land legislation, see Hooper 1933 (especially 369-71 for Articles 1431-1440 on the *muzāra'ah*, and Articles 1441-1448 on sharecropping involving trees, with no distinction between *mughārasah* and *musāqāh*).

[54] Cf. Rayner 1991: 160. In this sense it is virtually the same as the equally prohibited pre-Islamic contract of *muzābanah*, the only difference being that the latter involves dates rather than grain.

it is also used to mean simply a sharecropping contract involving grain growing land, in which case it is the same as *muzāraʿah*.[55] Although the term has therefore two different meanings, they are related in that both involve a commodity which is the object of a contract but which is not present at the time the contract is concluded—that is to say, an example of a *gharar* (risk) transaction which Islamic law tries to avoid, as has already been mentioned (Section 2.31 above).

Kirāʾ al-arḍ (sometimes *iktirāʾ al-arḍ*) is literally the renting or leasing of land and is not therefore specifically sharecropping. Nevertheless, in the context of the earliest Muslims, as narrated in the sharecropping *ḥadīth*s to be discussed later (Chapter 3 Section 3.3), the term can usually be construed as sharecropping since it would seem that this was a common method of renting out land at that time.

There are many other terms for sharecropping which have either a specific meaning or a local usage, and many of them would seem not to appear in the standard published lexical sources. Several more will be encountered in the course of this present work, especially when the specifically Yemeni aspects of the subject are examined in Part II. For reference, all terms known from the legal literature and also from specifically Yemeni oral sources have been collected in Appendix 1. These number eighteen for sharecropping land (excluding multiple variants from the same root), and a further four (again excluding variants) for sharecropping animals.

2.4 Concluding Remarks

The concern of this chapter has been first, to place sharecropping in its global context, and second, to point to some specifically Islamic aspects of the system, and in particular the difficulties which arise in Islamic law concerning the prohibition of *gharar* in contracts. The historical origin of the problem as it concerns sharecropping is to be found largely in the ambiguous character of the *ḥadīth*s (the Traditions relaying the *Sunnah*, or practice, of the Prophet) that deal with share-

[55] As in, for example, Muslim *Ḥadīth*s 3732 and 3756; cf. Siddiqi 1976: III, 815 n.1998. See also *Nayl al-Awṭār*: VI, 9, where al-Shawkānī quotes the view of al-Shāfiʿī from his *Kitāb al-Umm* (which is discussed later (Chapter 4, Section 4.2, below)).

cropping, and these *ḥadīth*s will be examined in detail in the next chapter (Chapter 3).

Whatever the theoretical legal positions however, it is often maintained that *'urf* (custom or customary law) rather than the *Sharī'ah* (the Islamic law) dominates public and private dealings not only in south-west Arabia but also much more widely in the Islamic world.[56] The importance of *'urf* in this context and its relationship to both the *Sharī'ah* and to modern statutory legislation will therefore be expanded in the next chapter.

[56] For example, Serjeant 1955a; Serjeant 1979; Maktari 1971; Løkkegaard 1950: 174; Schacht *EI*^{2}, article "*Bay'*": 1112b.

CHAPTER THREE

SHARECROPPING IN ISLAMIC LAW

"On peut dire qu'il y a presque autant de doctrines professées que d'auteurs ayant écrit sur la question [de la *muzāra'ah*]."

Louis Milliot[1]

3.1 INTRODUCTORY REMARKS

Although the focus of this book is the theory and practice of sharecropping in the Yemen, some basic concepts of Islamic law and their terminology must first be reviewed, since certain legal terms will recur later on. The concepts in question concern the distinctive nature of that law and particularly the position of custom and customary law relative to it. The chapter therefore begins with a brief discussion, in Section 3.2, on Islamic law and the sources from which it derives, and then on its relationship with customary law. The Section concludes with some remarks on theory and practice in the context of Islamic jurisprudence.

The chapter continues, in Section 3.3, with a detailed examination of the Primary Source in which all Islamic legal discussion on sharecropping is rooted, namely, the dozen or so Traditions (*ḥadīths*) which refer to the practice.

Section 3.4 is a brief overview of the positions taken on sharecropping by the various Islamic legal Schools (*madhhab*, pl. *madhāhib*) as a preparation in Chapters 4 and 5 for a detailed study of the stances of specifically the Shāfi'ī and Zaydī *Madhhab*s, these being the Islamic Schools which are of particular importance in the Yemen.

The chapter ends, in Section 3.5, with a discussion of the relevant Articles in the modern Yemeni Civil Code (*al-Qānūn al-Madanī*) which deal with sharecropping.

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[1] Milliot 1911: 17.

3.2 SHARĪʿAH AND ʿURF

3.21 Islamic law and the Uṣūl al-Fiqh

Islamic law differs from modern western conceptions of law in several respects, one of the most major of which is the fact that for Muslims the Islamic law, the *Sharīʿah*, is based on immutable divine revelation (*waḥy*, *sharʿ*), the embodiment of which is the Qur'ān. The Qur'ān is the first Primary Source (*aṣl*, pl. *uṣūl*) of the law for all Muslims. The *Sunnah*, the practice of the Prophet, is the second Primary Source and has been passed down through the generations in the form of *ḥadīth*s (Traditions) the two most prestigious and reliable collections of which are those of Muḥammad bn Ismāʿīl al-Bukhārī (d. 256/870) and Muslim bn al-Ḥajjāj (d. 261/875), called respectively the *Ṣaḥīḥ al-Bukhārī* and the *Ṣaḥīḥ Muslim*. These two Primary Sources (the Qur'ān and the Sunnah) are often referred to as the *naṣṣ* (the text or letter) of Islamic law.

The means to interpret these two Primary Sources are *ijmāʿ* (the unanimous consensus of qualified Muslim scholars) and *qiyās* (analogical deduction). Since the work of Muḥammad bn Idrīs al-Shāfiʿī (d. 204/820), the eponym of the Islamic legal School, Muslims have been generally united in regarding *ijmāʿ* as the Third Source of the law and *qiyās* as the Fourth Source.[2]

It must be mentioned that other terms are used by some Schools to mean *qiyās*, notably by some Shīʿah sects and by the Ibāḍīyah. The term *raʾy* was freely used in the ancient Islamic Schools to mean individual reasoning of both an arbitrary and a systematic nature without distinction,[3] though for most Muslims nowadays *raʾy* can mean only arbitrary opinion and has little place in law. The term *ʿaql* (reason, rationality) is or has been also similarly employed, with the same qualifications. A further term, *ijtihād* (literally, endeavour, effort, and more technically, striving to produce legal judgments on the basis

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[2] It should be noted that some contemporary Muslim scholars, for example, M.H. Kamali (1991: xix) prefer, when writing in English, to reserve the term "source" for the Qur'ān and the Sunnah and call *ijmāʿ* and *qiyās* "proofs" in order to mark their secondary and subservient status, since neither *ijmāʿ* nor *qiyās* can override explicit instructions of the Qur'ān or the Sunnah. However, Kamali is himself not entirely consistent in this, and the present writer has considered it adequate for his purposes to refer to these four bases of Islamic law by the term "source" or "principle", both of which may translate the Arabic *aṣl*.

[3] See, for example, Doi 1984: 77-78.

of the interpretation of the Sources), was held by al-Shāfi'ī to be synonymous with *qiyās*,[4] though in the analysis of most Islamic jurists this term tends to be employed with a wider signification, encompassing not only *qiyās* but also some subsidiary principles (such as *istiṣḥāb* and *istiṣlāḥ*) which will be discussed briefly below.

These four principles or sources (the Qur'ān, the Sunnah, *ijmā'* and *qiyās*), as systematized by al-Shāfi'ī, form then the four basic *uṣūl al-fiqh*, the sources or principles of the *Sharī'ah*, as accepted by most Muslims. The term *uṣūl al-fiqh* however also means the procedures applied to these sources to deduce the *fiqh*, the rules of the law. In clarifying the difference between *fiqh* and *uṣūl al-fiqh*, which are often confused in translation, Kamali helpfully gives the analogy of the relationship of grammar to a language and of logic to philosophy.[5] The *uṣūl al-fiqh* provide the correct criteria to deduce the rules, and the *fiqh* is the corpus of the rules so deduced, that is, the law itself. As such, the two terms refer to two connected though separate disciplines within Islamic law, and for a scholar to be called a *faqīh* (pl. *fuqahā'*), a specialist in *fiqh*, he must be expert not only in knowing the rules and how to apply them, but also in knowing their origin in the sources, the *uṣūl*.

Although in general al-Shāfi'ī's system of four principles or sources has been adopted by the Islamic Schools, some have made certain modifications. Most Islamic jurists add *ijtihād* to the *uṣūl al-fiqh*, though others, notably al-Shāfi'ī himself, have held that *ijtihād* and *qiyās* are synonymous, as has been mentioned above. Nevertheless, it would seem more helpful to consider *ijtihād* as the combination of *qiyās* and other more subsidiary principles, which is in fact the position adopted by many Muslims.[6]

One of these subsidiary sources of Islamic law, which is accepted by most Schools of *fiqh*, is the principle of *istiṣḥāb*, the presumption that a situation known to exist in the past continues to exist until there is evidence to the contrary. A.R.I. Doi provides several examples of this principle, one of which is that innocence of an accused is presumed until guilt is proved. Another of his examples, which has relevance in the field of land ownership, is that valid title deeds are

[4] Schacht 1950: 99.
[5] Kamali 1991: 2.
[6] Cf. Kamali 1991: xv.

presumed by a judge to be valid until the contrary is proved.[7] For *istiṣḥāb* to apply, the situation presumed to continue must be one which has the potential of permanent validity. That is to say, possession (of piece of land, for example) produced by a contract of sale (*bayʿ*) can be presumed to continue indefinitely (until there is proof of a change of ownership) since the *bayʿ* contract has no time limit inherent in it. Leasing the same piece of land by a contract of lease or hire (*ijārah*) on the other hand does not come within the scope of *istiṣḥāb*, since *ijārah* contracts are by their nature subject to time limits.[8]

Most of the Schools of Islamic law, though with the notable exception of the Shāfiʿī School, admit also the principle of *istiḥsān* (discretionary preference) as a subsidiary source of the law. A similar principle is called *istiṣlāḥ* (judging good), or *maṣāliḥ mursalah* ([public] welfare set loose [from the texts]), or simply *maṣlaḥah* ([public] welfare), according to the terminology of the different Schools. The idea behind all these terms is that discretion may be applied in judgments to overrule strict *qiyās* in cases where the public interest would thereby be benefited, with the proviso that such judgment, in order to be valid, does not contradict the explicit instructions of the Qur'ān, the Sunnah or *ijmāʿ*. Doi provides seven examples of cases where *istiḥsān* has tempered strict *qiyās* and been permitted in the interest of public welfare.[9] One of these, *bayʿ bi-al-wafāʾ* (sale subject to a future redemption) is a type of mortgage permitted exceptionally because of public need, even though it involves *gharar* (risk), a concept which has already been noted in the previous chapter (Section 2.3) as a major problem in Islamic sharecropping contracts.

A further subsidiary principle, that of *ʿurf* (custom), is in practice recognised by all the main Schools of *fiqh* when it does not contradict the *Sharīʿah*, though the extent to which it is an independent source of Islamic law is subject to different opinions. A more detailed examination of *ʿurf* and how it relates to the rest of the *Sharīʿah* will be taken up below (Section 3.22). Here it need be noted only that where the *ʿurf* in question is *ṣaḥīḥ* (that is, where it does not conflict with the explicit instructions of the *Sharīʿah*), it can, like *istiḥsān*, be used to

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[7] Doi 1984: 83-84.

[8] The significance of this matter will be seen more clearly when, in Chapter 8 below, the *fatwās* (legal opinions) of the Shāfiʿī shaykh Ibn Jaʿmān are discussed. For a more detailed and authoritative yet very approachable account of *istiṣḥāb*, see Kamali 1991: 297-309.

[9] Doi 1984: 82-83.

overrule strict *qiyās*, and also that *'urf* may be *fāsid* (that is, in conflict with the *Sharī'ah*) and yet nevertheless be practised by the people[10]—in which case theory has become separated from practice.

In summary, then, it is possible to regard Islamic law as comprising three components or types of law: first, divinely ordained law (the Qur'ān and the Sunnah); second, discretionary law (*ijmā'*, *qiyās* and for many Muslims the other types of *ijtihād*); and third, customary law. In theory, when a legal opinion (*fatwā*) is called for (to resolve a dispute, for example, over land ownership or tenancy), then the giver of the *fatwā* (the *muftī*) will search for his answer in each of the *uṣūl* in turn, beginning with the Qur'ān and then the Sunnah (as recorded in the *ḥadīths*), and if both Primary Sources fail to provide an answer, only then he will have recourse first to *ijmā'*, then to *qiyās*, and lastly to the lesser principles, including *istiṣḥāb*, *istiḥsān* and *'urf*.

3.22 Relationships between the Sharī'ah *and Customary Law*

(a) *'Urf* and *'Ādah*:

There are two terms in Arabic which are used in the general sense of custom: *'urf* (literally, what is known, from the root verb *'arafa*, to know; pl. *a'raf*), and *'ādah* (pl. *'ādāt*, from the root verb *'āda*, to return, and therefore some action which is returned to habitually). Some authorities distinguish between them. The *Tāj al-'Arūs* records that some say that *'ādah* refers to actions, while *'urf* concerns words.[11] According to certain Islamic jurists on the other hand, *'urf* is "the collective practice of a large number of people", while *'ādah* is the habit of only individuals or groups.[12] In the hands of other authorities, *'urf* is often translated into English as customary law, while *'ādah* is rendered as habit with no legal implications, an important distinction reminiscent of that made clearly in a much broader context by the great English legal philosopher H.L.A. Hart.[13] If this distinction is adhered to, then it is *'urf* which concerns the present discussion, rather than *'ādah*. More frequently however, the two terms are not distin-

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[10] Kamali 1991: 293; Schacht 1964: 62

[11] *Tāj al-'Arūs* (1965-), entry *'ādah* (VIII, 443b$_{3-6}$).

[12] Kamali 1991: 283.

[13] Hart 1961: 54-56. In Hart's legal scheme, a habit is an element of convergent social behaviour which attracts no censure if it is breached; a custom in contrast is prescriptive and its breach leads to criticism or sanctions from other members of society. I am grateful to my friend Colin R. Munro, Professor of Public Law, University of Edinburgh, for introducing me to the work of H.L.A. Hart.

guished in Islamic law, since most authorities would seem to use *'urf* and *'ādah* interchangeably. Here, *'urf* (and its plural *a'rāf*) will be used to mean customary law in the Islamic context.

(b) The Validity of *'Urf* in the *Sharī'ah*

The question of the extent to which *'urf* is a valid principle in the *Sharī'ah* requires some discussion. The issue is clouded since some authorities imply that *'urf* stands in opposition to the *Sharī'ah*, whereas others include *'urf* among the possible *uṣūl* (sources or principles) of the *Sharī'ah*. The theoretical position of the Shāfi'ī School is to reject *'urf* as a valid *aṣl*. In contrast, the Ḥanafīs and the Mālikīs in particular give weight to *'urf* in theory as well as in practice.[14] The Zaydīs too, in line with their generally pragmatic approach to legal questions, tend to accept *'urf* as a valid *aṣl*.

Attitudes taken by modern writers on Islamic law concerning the extent to which *'urf* is or is not part of the *Sharī'ah* also vary. For example, A.R.I. Doi includes *'urf*, albeit briefly, in his list of the sources of Islamic law, though only in cases which are not at variance with the Qur'ān and the Sunnah.[15] M.H. Kamali discusses *'urf* in some detail and similarly designates it as a valid and authoritative source of law when it does not contravene the principles of the *Sharī'ah*.[16] In contrast, Joseph Schacht saw a conflict between *'urf* and *Sharī'ah* in actual practice[17] and stated explicitly that Islamic law "ignores custom as an official source".[18] A.M.A. Maktari, in the introduction to his study of the irrigation of Laḥj, reports similarly that in theory Shāfi'ī jurists reject *'urf* as a source of Islamic law, or even as a complement to the *Sharī'ah*, but nevertheless it is clear from his study that irrigation in Shāfi'ī Laḥj is governed by the rules of local customary law.[19] Many of R.B. Serjeant's works concern the interplay between *'urf* and *Sharī'ah*, especially in southern Yemen but also more generally.[20] Other researchers have found a conflict be-

[14] Rayner 1991: 33.
[15] Doi 1984: 84.
[16] Kamali 1991: 284.
[17] For example, Schacht 1964: 76.
[18] Schacht 1964: 62.
[19] Maktari 1971: 5.
[20] Of the many of Serjeant's studies which examine the relationship between Yemeni and Arabian customary law and the *Sharī'ah* could be mentioned the following: Serjeant 1955a in which he discusses forms of plea from a manual from al-Shiḥr; Serjeant 1962a which studies the origin and development of the *ḥaram* and *ḥawṭah* (the pre-Islamic and Islamic sacred enclosure); Serjeant 1962b regarding

tween *'urf* and *Sharī'ah* in the modern context, as for example A. Layish and A. Shmueli in their examination of Judaean bedouin legal documents.[21]

Whatever the theoretical view of a particular School or authority may be, it is indisputable that *'urf* greatly influenced Islamic law in its earliest development and has continued to influence it down to the present day. Whether and to what extent *'urf* should be considered in opposition to the *Sharī'ah* or as one of its legitimate *uṣūl* are questions best left to the legal theorist, since in the practical world they would seem to be at best unhelpful and at worst misleading.

Some customs are not in conflict with any *Sharī'ah* principles and are said to be *ṣaḥīḥ*. These are by definition as much part of the *Sharī'ah* as other subsidiary sources for example of *istiḥsān* and *maṣlaḥah* insofar as they are used as bases for *fatwā*s and judgments by Islamic judges, though admittedly, it would seem, to a varying extent by different Schools. Indeed, Kamali points out that *'urf* and *maṣlaḥah* are closely related concepts in that they seldom conflict and each serves as "a means for the realisation of public welfare and the prevention of hardship to people",[22] and further, both, like *istiḥsān*, can on this basis override strict *qiyās*, even though *qiyās* is otherwise of a higher level of authority as a source of the *Sharī'ah*, as has been mentioned.

In the case of other customs there is clear evidence that they do conflict with the *Sharī'ah*, and are therefore *fāsid*. One example would be the disinheritance of females as practised by certain bedouin tribes. Even *'urf fāsid* however can be regarded as law, insofar as it practised and accepted as such by the majority of a population, since to be law neither legislative enactment nor judicial recognition is an essential requirement, though of course such *'urf fāsid* would not be part of the *Islamic* law.

The conditions under which *'urf* may be valid in Islamic law have been summarised by Kamali.[23] According to him, in order for *'urf* to

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marriage legislation and marriage customs in al-Mukallā; Serjeant 1964 and 1988 dealing with Ḥaḍramī and other Yemeni irrigation systems; Serjeant 1979 where he discusses the importance of customary law documents as an historical source; and Serjeant 1980 where his subject is the customary law among the fishermen of al-Shiḥr. Most of these articles have been reprinted as Serjeant 1991 and Serjeant 1995.

[21] Layish and Shmueli 1979: 29-45

[22] Kamali 1991: 291.

[23] *Ibid.* 1991: 286-88.

be used as a basis for legal decisions in Islam, it must meet the following conditions. The basic requirement is that it must be "reasonable and acceptable to people of sound nature" and that it therefore should be free of prejudice and corruption. Kamali then adds the following four requirements: (1) it must be observably dominant in the society; (2) it must be in existence at the time of a transaction; (3) it must not contravene what is stipulated in a contractual agreement (which generally takes precedence); and (4) it must not violate the *naṣṣ* (the definitive principle of the law as embodied in the Qur'ān and the Sunnah). Even when these conditions are met however and a particular *'urf* in question is regarded as *'urf ṣaḥīḥ* (that is, *'urf* in which there is no conflict with the *Sharī'ah*), many Islamic jurists do not accept it as an independent proof in its own right, however important it may be as a guiding principle in practice.[24]

Even though *'urf* is not regarded by some as an official source of Islamic law, there is no doubt that judgments based on it can be valid and that not only has it been extremely influential in the development of the *Sharī'ah*, but it was a major agency in its original formation.[25] Because of both the divinely revealed basis of the *Sharī'ah* and the fact that the perspective of historical development was theoretically lacking in Islamic jurisprudence, the debt which the *Sharī'ah* owes to *'urf* was largely ignored until the work of the Western analysts. Building on the work of Ignaz Goldziher, Joseph Schacht concluded that the *Sharī'ah* was the outcome of a complex historical process based in the *'urf* of the pre-Islamic Arabs and of the peoples they conquered.[26] Although subsequent analysts and commentators have quarrelled with the details of Schacht's argument it is now widely accepted that the roots of Islamic jurisprudence are indisputably in pre-Islamic Arabian *'urf*. J. Chelhod, for example, believes Schacht overstated his case and gave too little emphasis to the changes that Islam brought, but he nevertheless concludes that "il est indéniable en effet que le substrat antéislamique tient une place importante dans le nouveau système religieux".[27]

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[24] See for example Maktari 1971: 5.

[25] Schacht 1964: 12ff. and *passim.*; Chelhod 1986, especially 20-23.

[26] Schacht 1964: *passim.*, esp. Chh. 2, 3 and 4. Whatever might be the theoretical position of the classical view, Islamic legal history does exist, as Coulson (1964: 4) says.

[27] Chelhod 1986: 20.

3.23 Islamic Theory and Islamic Practice

In its theoretical classical conception, the *Sharīʿah* has no notion of any historical development, and changing social conditions and requirements have in theory no legitimate role in deciding Islamic law. In practice, however, as has been pointed out above, *istiḥsān*, *istiṣlāḥ* or *maṣlaḥah* can commute the strict application of *qiyās* where public interest would thereby be served. *ʿUrf* similarly can override *qiyās* where there are already established customs. In either case *qiyās* can be overturned only where the *Sharīʿah* would not be expressly contradicted—though, of course, since those subsidiary principles together with *qiyās* have themselves played a leading part in forming the *Sharīʿah* into a comprehensive and consistent body of law, and since moreover the various Schools differ on many points of practical detail within that body of law, it may well be wondered what the phrase "only where the *Sharīʿah* would not be expressly contradicted" actually means.

For this reason it has been frequently claimed, following the analyses of Ignaz Goldziher and then Joseph Schacht, that there is a gulf between the theoretical ideal and actual practice in Islam; or in other words, that there is inherent in Islamic law a distinction between what might be considered the ideal, theoretical doctrine, and the actual practice as found in the real world. Schacht states specifically that there is inherently a conflict between *ʿurf* on the one hand and *Sharīʿah* on the other.[28] This gulf is claimed to be inherent in Islamic law and quite apart from the fact that few human beings are capable of living up to the societal ideal. Although to an extent theory and practice may be divorced in any system of law, the gap is alleged to be particularly wide in the case of Islamic law, and the fact that Islamic law is a revealed law, impregnable to changing mores, is cited in support. As N.J. Coulson has put it,

> Law, in classical Islamic theory, is the revealed will of God, a divinely ordained system preceding and not preceded by the Muslim state, controlling and not controlled by Muslim society.[29]

Many Muslims have criticised this attitude as being part of a mistaken, even condescending, orientalist view of Islam. According to them, the question is not one of a gulf or a dichotomy between theory

[28] Schacht 1964: 76.
[29] Coulson 1964: 1-2.

and practice. The real point is, as Aziz al-Azmeh has explained, the necessity of maintaining a distinction between *sharī'ah* ("divine law") and *fiqh* ("legislation").[30] For a Muslim, there is no difficulty reconciling the immutable divinely revealed law, the *Sharī'ah*, with the changes which occur inevitably with time in any society and which are the province of *fiqh* and concern the application of the *uṣūl al-fiqh* including where appropriate changes necessitated by changes in *'urf*.

In any case, although *'urf* on the one hand and *fiqh* and the *Sharī'ah* on the other have been frequently set up as opposites, as "heresy" versus "orthodoxy", the opposition is rarely more than rhetorical. Whatever parts of *'urf* do not directly conflict with *fiqh* and the *Sharī'ah* can be automatically included in the Islamic law, and even if an aspect of *'urf* is ostensibly at variance with *fiqh* and the *Sharī'ah*, a way can often be found, through the application of the principles of *maṣlaḥah*, *istiḥsān* and so on, of making it concordant, if it is in the public interest to make it so. Even in the Yemen, where the *Sharī'ah* has traditionally been identified with the learned *Sādah*, the *Sayyid* descendents of the Prophet, as opposed to the non-learned tribesmen with their *'urf* as identified with the *ṭāghūt*, and the constant attempts by the former to expand their understanding of the *Sharī'ah* over the latter,[31] the supposed *Sharī'ah-'urf* conflict is probably more rhetorical than real.[32]

If a valid distinction is to be made in terms of theory and practice it is not then in terms of *Sharī'ah* versus *fiqh*, nor *Sharī'ah* versus *'urf*, but rather between Islamic law with all its attributes and in all its manifestations on the one hand and modern statute law (*qānūn*) on the other. This distinction has been well recognised by Muslim authorities, and many attempts have been made over the centuries to reconcile the two, the 10th/16th century Ottoman *qāḍī* Ebu 's-Su'ud (Abū al-Su'ūd) being perhaps the best known and most successful case in point.[33] At the same time, in many legal areas Islamic law as such is however either defunct or irrelevant in modern Muslim states. How slaves are to be treated or war booty shared are in this category. Both

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[30] Al-Azmeh 1988.

[31] Cf. Serjeant 1955a: 2; Dresch 1993: 183-86.

[32] As Paul Dresch (1993: 186) concludes on the subject in the Yemeni context, "The implication of many Zaydi sources that there is a distinct customary code at odds with Islam is scarcely borne out".

[33] Ebu 's-Su'ud and the integration he constructed between the *Sharī'ah* and Ottoman *qānūn* are the subject of a recent work by Colin Imber (1997).

subjects are of great historical interest but neither is of any utility in current practice. Further, even in fields where the revealed law is still applicable, there are very few Muslim countries in which it has not been extensively modified and reformed since the mid-nineteenth century, especially in the fields of commercial and international law, on principles the origin of which lies not in the Islamic tradition but in Western statute law.[34] As will be seen in the case of sharecropping in the Yemen (Section 3.5 below), however, even in modern statute law any discordance between it and Islamic law may also be more apparent than real.

3.3 THE SHARECROPPING *ḤADĪTH*S

3.31 The Ḥadīth*s in Question*

Although in practice all four Schools of Islamic Sunni law (the Ḥanafīs, Mālikīs, Ḥanbalīs and Shāfi'īs) and also the Shī'ah Zaydī School accept the validity of sharecropping to a greater or lesser extent, they circumscribe the sharecropping contracts of *muzāra'ah*, *musāqāh*, *mughārasah* and the others with a number of restrictions and conditions. Between and even within the Schools there is disagreement on what conditions make sharecropping contracts valid. Since there is no mention of sharecropping as such in the Qur'ān, the first of the two Primary Sources, jurists base their views ultimately on a number of *ḥadīth*s (Traditions) which specifically refer to renting out land and sharecropping. The reasons for the lack of unanimity among the jurists on the validity or otherwise of the practice are largely to be found in the ambiguous way the Sunnah of the Prophet has been narrated in these *ḥadīth*s.

It is the purpose of this Section (3.3) to examine in some detail these so-called sharecropping *ḥadīth*s, as recorded in the *Ṣaḥīḥ*s of al-Bukhārī and Muslim. Although there are other collections of *ḥadīth*s which are regarded as valid, those of al-Bukhārī and Muslim are the most prestigious and are considered to be the most authoritative, and

[34] There are many modern studies of the place of statute law in Muslim countries. For example, Anderson (1976) gives an excellent overview of modern Islamic law reform. Ballantyne (1990) studies the present position in the Gulf States. Rayner (1991) provides a comprehensive view of the Islamic law of contracts in theory and practice, again with particular reference to the Gulf States.

discussion here will be limited to the texts of the *ḥadīth*s as recorded by them. The details of the editions consulted are given in full in the Bibliography.[35]

Unfortunately, the relevant *ḥadīth*s give reason both to permit and to forbid the practice of renting out land for a share of the harvest. Because of this contradiction the section of the Traditions which deal with leasing land is indeed in the words of 'Abdul Hamid Siddiqi "one of the most difficult chapters of Ḥadīth".[36] An examination of the relevant *ḥadīth*s shows that they fall into two categories: those in which the Prophet is said to have permitted sharecropping contracts and those in which he seemingly prohibited them.

3.32 The Ḥadīth*s permitting Sharecropping*

The first group—those which seem to permit sharecropping—tend to be narrated in the context of two historical events (though in fact in only one *ḥadīth* of this group[37] is any of the terms for sharecropping (*mukhābarah*) specifically used). The first event is the arrival from Mecca of the *Muhājirūn* at Medina when they were instructed by the Prophet to work the land of the Medinan Muslims, the *Anṣār*, for a share of the produce, the share being usually interpreted to mean a share proportional to the work they had exerted.[38] The second event is the agreement the Prophet made with the Jews of the oasis of Khaybar some 90 miles (145 km) north of Medina, after they had submitted to him in the summer of 7/628.[39] By the terms of the agreement the Prophet allowed them to remain on their former land on condition that half the produce from it be given to him and the Muslims. Additionally, there are a number of *ḥadīth*s in which it is definitively stated that the Prophet did not forbid sharecropping though the specific historical context is not given.[40]

Concerning first the situation on the arrival of the *Muhājirūn* at Medina, the relevant *ḥadīth*, which is transmitted ultimately from the

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[35] Under al-Bukhārī *Ṣaḥīḥ* (Arabic text and translation); Khan (transl. and ed.) 1976 (translation of al-Bukhārī's *Ṣaḥīḥ*); and Muslim *Ṣaḥīḥ* (Arabic text and translation).

[36] Siddiqi 1976: III, 815 fn.1998.

[37] The *ḥadīth* in question here is al-Bukhārī *Ḥadīth* 523.

[38] The main *ḥadīth* here is al-Bukhārī *Ḥadīth* 518, though other *ḥadīth*s refer to the same event.

[39] For the historical event, see Veccia Vaglieri *EI*^{2}, article "Khaybar"; and Watt 1956: 217-19. The main *ḥadīth*s here are al-Bukhārī *Ḥadīth*s 521, 522, 524 and 531.

[40] Al-Bukhārī *Ḥadīth*s 523 and 533.

Companion Abū Hurayrah, narrates that when the *Anṣār* asked the Prophet to divide up the date-palms between them and the *Muhājirūn* the Prophet refused, and the *Anṣār* instead invited the *Muhājirūn* to tend the trees and share the fruit with them. Since in this *ḥadīth* the Prophet did not prohibit the arrangement this has been interpreted as supporting the validity of sharecropping generally, though others have held that the situation was specific to date-palm plantations and that validation can therefore be applied only to *musāqāh* (sharecropping involving date-palms and possibly other irrigated perennials) and not to *muzāra'ah* (sharecropping on annually sown land).[41] Others have gone further and hold that this *ḥadīth* does not validate sharecropping at all but rather refers to the specific historical situation from which no generally applicable *qiyās* (legal analogy) can be drawn, since it was, in the words of S.M. Yusuf, "merely ... a generous attempt to assimilate the newcomers [the *Muhājirūn*] into the pattern of the [Medinan] economy".[42]

Concerning the *ḥadīth*s which narrate how the Prophet dealt with the Jews of Khaybar, they all are transmitted ultimately from 'Abdallāh bn 'Umar, the son of the second caliph and therefore ostensibly an unimpeachable source. They recount how the Prophet allowed the Jews to continue to work the land on condition that they handed over to him and the Muslims half the produce from it. It is significant that two of these *ḥadīth*s as transmitted by al-Bukhārī state specifically that the produce might include either *thamr* (fruit) or *zar'* (grain), or presumably both.[43] Many jurists hold that this event can be extended by *qiyās* to sharecropping generally, including *muzāra'ah* (since *zar'* is mentioned), and this is their basis for regarding sharecropping legally valid. Others however deny any possible *qiyās* and

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[41] The terminology has already been explained in greater detail in Chapter 2 (Section 2.32 above).

[42] Yusuf 1957: 33.

[43] In al-Bukhārī *Ḥadīth*s 521 and 522 the wording is: شطر ما يخرج منها من ثمر أو زرع *shaṭr mā yakhruj min-hā min thamr aw zar'* ("half of any fruit or grain that is produced from [the land]"). In *Ḥadīth* 524 the wording is simply شطر ما يخرج منها *shaṭr mā yakhruj min-hā* ("half of what is produced from [the land]"); and in *Ḥadīth* 531 نصف الثمر *nisf al-thamr* ("half the fruit").

consider that the share of the crop handed over by the Jews was not a rent or payment for the usufruct but rather was in the nature of *kharāj al-muqāsamah*—that is to say, a tax on the land expressed as a proportion of the harvest.[44]

As for the *ḥadīth*s which specifically deny that the Prophet forbade sharecropping, the first two concern Ṭāwūs, who reported that Ibn 'Abbās, the cousin of the Prophet, had affirmed that the Prophet did not forbid sharecropping but rather had said that if a landowner could not cultivate his land himself it would be better for him to give it to a neighbour without charging rent. In al-Bukhārī *Ḥadīth* 523, the critical wording is as follows:

لم ينه عنه ولكن قال إن يمنح أحدكم أخاه خير له من أن يأخذ خرجاً معلوماً .

lam yanh^{a} [al-nabī] 'an-hu wa-lākin qāl : in yamnaḥ aḥad^{u}-kum akhā-hu khayr^{un} la-hu min an ya'khudh^{a} kharj^{an} ma'lūm^{an}

([The Prophet] did not prohibit [the practice] but said, 'If one of you should grant his brother [some land], it would be better for him that he take a fixed sum as rent').

In *Ḥadīth* 534, the wording is identical, except that خرجاً معلوماً (*kharj^{an} ma'lūm^{an}*, a fixed rent) is replaced by شيئاً معلوما (*shay'^{an} ma'lūm^{an}*, a fixed amount), though this does not affect the overall meaning.

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[44] Cf. Yusuf 1957: 33.

Concerning *kharāj al-muqāsamah* 'Abd al-Khāliq al-Nawāwī defines it as follows:

خراج المقاسمة هو أن يكون الواجب بعض الخراج كالربع والثلث والخمس مثلاً حتى إذا لم تخرج الأرض شيئاً لم يجب خراج المقاسمة.

kharāj al-muqāsamah huwa an yakūn^{a} al-wājib ba'ḍ al-kharāj ka-al-rub' wa-al-thulth wa-al-khums mathal^{an} ḥattā idhā lam tukhrij al-arḍ shay'^{an} lam yajib kharāj al-muqāsamah (The *kharāj al-muqāsamah* is [the term used when] the due is to be paid as a proportion of the produce, such as a quarter, a third or a fifth, for example, so that if the land produces nothing then the *kharāj al-muqāsamah* will not have to be paid) (al-Nawāwī 1973: 131). The Ottoman Land Code (Article 2, Section iv) says that it is "proportional tribute" which is "levied to the amount of from one-tenth to one-half of the crop, according to the yield of the soil" (Fisher 1919: 1). Incidentally, the similarity of this kind of tax with sharecropping becomes very clear when the landowner is the state, in which case it can be difficult to distinguish between the tax due to the state by virtue of its being the state and the share due to the state by virtue of its being the landlord.

Of all the *ḥadīth*s which give support to the validity of sharecropping it is only in fact in *Ḥadīth* 523 that the term *mukhābarah* is specifically mentioned. If the term had not been stated, it might well be argued that neither of these *ḥadīth*s refer to sharecropping at all but rather to leasing land for a fixed rent.

The third of this set of *ḥadīth*s, which is narrated ultimately from both Jābir and Abū Hurayrah, has no mention of Ṭāwūs or of the denial by Ibn 'Abbās that the Prophet had banned sharecropping, but the rest of this *ḥadīth* is essentially the same as the other two.[45]

All these *ḥadīth*s have been interpreted by many as meaning that it is only a recommendation of the Prophet that land which cannot be cultivated by its owner should be given to someone else free of charge, and not a definitive prohibition of sharecropping.[46] Others however have interpreted them more severely. S.M. Yusuf, for example, has glossed the Abū Hurayrah version of the *ḥadīth* as meaning that if someone had neither the capacity to till his land himself nor the generosity to give it to his brother to till, "then there was no alternative for him but to cling in a tenacious and foolhardy manner to his possession without any benefit to himself or to others".[47] It is clear however that if the words of Ibn 'Abbās as reported by Ṭāwūs are to be believed, in which the Prophet is recorded as explicitly not forbidding the practice, then such a strict interpretation as Yusuf's can hardly be adopted.

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[45] Al-Bukhārī *Ḥadīth* 533.

From Jābir the wording is: من كانت له أرض فليزرعها أو ليمنحها فإن لم يفعل فليمسك أرضه. *man kānat la-hu arḍ[un] fa-l-yazra'-hā aw la-yamnaḥ-ha fa-in lam yaf'al fa-l-yumsik arḍ[a]-hu;* and from Abū Hurayrah:

من كانت له أرض فليزرعها أو ليمنحها فإن أبَى فليمسك أرضه. *man kānat la-hu arḍ[un] fa-l-yazra'-ha aw la-yamnaḥ-hā fa-in abā fa-l-yumsik arḍ[a]-hu.* Khan translates both of these versions as "Whoever has land should cultivate it himself or give it to his (Muslim) brother *gratis*; otherwise he should keep it uncultivated."

[46] For example, Khan 1976: 302 n.1.

[47] Yusuf 1957: 32.

3.33 The Ḥadīth*s prohibiting sharecropping*

The prohibitory *ḥadīth*s fall into two sets. The first concerns sharecropping as practised by certain of the Companions (*Aṣḥāb*) of the Prophet and their Successors (*Tābi'ūn*), including Zubayr bn Rāfi' and 'Abdallāh bn 'Umar. All but one of these concern, and ultimately derive from, Zubayr's father Rāfi' bn Khadīj,[48] and so for convenience they might be called "The Rāfi' *Ḥadīth*s". It is expressly mentioned in these *ḥadīth*s that the landowner's share of the produce was the crop from a specified part of the land and that this practice was specifically prohibited by the Prophet. The second set are outright prohibitions of sharecropping and other types of pre-Islamic contract but they are narrated without historical context.[49]

(a) The Rāfi' *Ḥadīth*s:

As regards first the Rāfi' *Ḥadīth*s, all are concerned with a system of sharecropping in which the landowner's share is defined by the part of the crop from a specific part of the land. Three of them mention that the part of the land from which the landowner's share comes was *'alā al-rabī'* or *'alā al-arbi'ā'*. M.M. Khan translates this phrase as "on the banks of the water streams", an interpretation which is fully supported by some of Lane's sources.[50] If the phrase *'alā al-rabī'* or *'alā al-arbi'ā'* indeed refers to the parts of the land alongside the water courses (as would seem likely), then the prohibition of sharecropping in these circumstances is perfectly understandable: such land will normally have a higher productivity than land further away since it will be better watered, and the share the landowner takes would therefore be unfair to the sharecropper.[51] Moreover, according to two of these *ḥadīth*s, the landowner also received an absolute quantity of other produce, a situation which can again be interpreted as unfair to

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[48] Al-Bukhārī *Ḥadīth*s 520, 525, 532, 535 and 537. *Ḥadīth* 535 (corresponding to *Ḥadīth* 3736 in the *Saḥīḥ* of Muslim) is narrated by Nāfi', the *mawlā* of 'Abdallāh bn 'Umar and well-known narrator of *ḥadīth*s.

[49] Al-Bukhārī *Ḥadīth* 567; and Muslim: X, 194-96 in the Cairo (1929) edition (= *Ḥadīth*s 3707 and 3709-3712 in the Siddiqi (1976) translation).

[50] Khan 1976: III 309, 310, 311; Lane 1863-93: 1019b, under *rabī'* (pl. *arbi'ā'*).

[51] At the present time in the Yemen land nearest a water channel has first call on the water, and the fields furthest away from the channel must wait for their share, a system summarised in the phrase الأعلى فالأعلى *al-a'lā fa-al-a'lā* (lit. "the highest [plot], then the [next] highest"; cf. Varisco 1982: 248-55 in al-Ahjur (northern Yemen); Serjeant 1964: 37-41 in Ḥaḍramawt; Maktari 1971: 56ff. in Laḥj (southern Yemen). Cf. also Bruno 1913: 36, for the more general context.) In circumstances where there is a shortage of water the further fields may sometimes not be watered at all.

the sharecropper (since any part of the rent which is expressed in absolute terms cannot be part of a sharecropping system and must therefore be regarded as an additional surcharge payable whatever the size of the harvest). These quantities over and above the landowner's proportional share in these *ḥadīth*s are recorded as measures of dates and barley (*awsuq*[52] *min al-tamr wa-al-sha'īr*) in one case and of figs (*shay' min al-tīn*) in the other. In addition, another of this set of *ḥadīth*s from Rāfi', though not mentioning specifically the banks of water channels, does state that if the crop is divided up by area then the part of the crop from one area of the land may not yield as highly as the other. This situation can also be construed as carrying more risk for one party to the contract than for the other. In short, then, the Prophet's prohibition of sharecropping under these conditions can be understood as concern that neither of the two parties to the contract, and in particular the sharecropper, is unfairly recompensed for his contribution to the enterprise.

There is a further point concerning one of these "prohibitory" Rāfi' *Ḥadīth*s.[53] It records that 'Abdallāh bn 'Umar, the son of the second caliph, used to rent farms during the time of the Prophet and throughout the caliphates of Abū Bakr, 'Umar, and 'Uthmān and into that of Mu'āwiyah[54] and only then heard the narration of Rāfi' bn

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[52] A *wasq* (pl. *awsuq*) is a measure of capacity made up of 60 *ṣā'*. According to Hinz (1955: 53), it was equivalent to just over 252 litres as it was used in early Islam.

[53] Al-Bukhārī *Ḥadīth* 535 (corresponding to *Ḥadīth* 3736 in the *Saḥīḥ* of Muslim), narrated by Nāfi'.

[54] The al-Bukhārī *ḥadīth* says "the beginning of Mu'āwiyah's reign", but the version found in Muslim says "until the end of Mu'āwiyah's caliphate". The al-Bukhārī text of this section reads:

كان يكري مزارعه على عهد النبي صلى الله عليه وسلم وأبي بكر وعمر وعثمان وصدر من إمارة معاوية.

kāna yukrī mazāri'a-hu 'alā 'ahdi al-nabī (ṣl'm) wa-Abī Bakrin wa-'Umara wa-'Uthmāna wa-ṣadran min imārati Mu'āwiyata (He used to rent out his farms during the time of the Prophet (may peace be upon him) and of Abū Bakr, 'Umar and 'Uthmān and the beginning of the rule of Mu'āwiyah).

The Muslim version reads:

كان يكري مزارعه على عهد النبي صلى الله عليه وسلم وفي إمارة أبي بكر وعمر وعثمان وصدرا من خلافة معاوية حتى بلغه في آخر خلافة معاوية.

kāna yukrī mazāri'a-hu 'alā 'ahdi al-nabī (ṣl'm) wa-fī imārati Abī Bakrin wa-'Umara wa-'Uthmāna wa-ṣadran min khilāfati Mu'āwiyata ḥatta balagha-hu fī ākhiri khilāfati Mu'āwiyata (He used to rent out his farms during the time of the Prophet (may peace be upon him) and during the rule of Abū Bakr, 'Umar and 'Uthmān and the beginning of the caliphate of Mu'āwiyah until [the news of the Prophet's words] reached him at the end of the caliphate of Mu'āwiyah).

Khadīj that the Prophet had forbidden the practice. That is to say, 'Abdallāh bn 'Umar continued to lease land after the Prophet's death in 11/632 until at least the 40s/660s (that is, a minimum of thirty years), and possibly even until 60/680 (the end of the caliphate of Mu'āwiyah), before he discovered that the practice was prohibited. If leasing land had indeed been formally forbidden outright by the Prophet it is strange (to say the least!) that between thirty and fifty years should have elapsed after the death of the Prophet before someone so eminent in the Muslim community as 'Abdallāh bn 'Umar heard of the prohibition.

(b) The Prohibitory *Ḥadīth*s without Context:

The second set of prohibitory *ḥadīth*s is more difficult to evaluate since the prohibition of *mukhābarah* is stated bluntly and without historical context.[55] What can be noticed however is that in each of them the prohibition of *mukhābarah* is linked to prohibitions of other kinds of agricultural contract known as *muḥāqalah* and *muzābanah*, both of which are to be understood here as exchanges of ripe produce for produce not yet harvested.[56] Further, the prohibition here should be studied in relation to the two *ḥadīth*s which al-Bukhārī records immediately afterwards and which concern an exceptionally permitted transaction called *'arāyā*.[57] The texts of the relevant *ḥadīth*s in the *Ṣaḥīḥ* of al-Bukhārī can be translated as follows:

Ḥadīth 567 (narrated by Jābir bn 'Abdallāh):

> The Prophet forbade the *mukhābarah* and the *muḥāqalah* and also the *muzābanah* and the sale of fruit until it becomes visibly fit [for eating], and that [the fruit] is not sold other than by dīnār and dirham, except in the case of *'arāyā*.

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[55] Al-Bukhārī *Ḥadīth* 567; and Muslim: X, 193-96 of the Cairo (1929) edition (= *Ḥadīth*s 3707-3713 in the Siddiqi translation).

[56] The terms *muḥāqalah* and *muzābanah* have already been mentioned in the discussion on the terminology of sharecropping above (Chapter 2 Section 2.3) and are explained also in the text of one of Muslim's *ḥadīth*s which will be examined below.

[57] *'Arāyā* (sing. *'arīyah*) is an exceptionally permitted exchange of dates which are still growing on the palm for dried dates up to the amount of 5 *wasq*s (see n.52 above for *wasq*). The quantity of dried dates can, of course, be measured, but the dates on the palm have to be estimated. This type of exchange was permitted, it is interpreted, to benefit someone who owns fruit growing on date-palms but needs fruit immediately and cannot wait for his fruit to ripen.

Ḥadīth 568 (narrated by Abū Hurayrah):

> The Prophet allowed *'arāyā* sale for which the [quantity of] dates is estimated, up to [a quantity] either less than or equal to 5 *wasqs*—Dāwūd [one of the *isnād* (chain of narrators)] is not sure which is correct.

Ḥadīth 569 (narrated by Rāfi' bn Khadīj and Sahl bn Abī Ḥathmah):

> The Prophet forbade the *muzābanah*, [that is,] the sale of fruit for fruit, except for people who practise *'arāyā* which he allowed them.

The texts of the corresponding *ḥadīth*s in the *Ṣaḥīḥ* of Muslim are essentially the same: prohibition of the contracts called *mukhābarah*, *muḥāqalah* and *muzābanah*, except for the case of *'arāyā*.[58] All these types of prohibited contract are explained in Muslim's text according to Jābir bn 'Abdallāh's narration as follows: *mukhābarah* is when one man hands over *arḍ bayḍā'* (land without standing crops) to another who invests in it and gets a share of the produce in return; *muzābanah* is the sale of dates which are still on the palm for dried dates by an absolute measure (*kayl*[m]); and *muḥāqalah* is the same as *muzābanah* except it refers to grain—that is, the sale of grain which is still growing for grain already harvested. In addition, one of the *ḥadīth*s in Muslim's *Ṣaḥīḥ* includes also the prohibition of a contract called *mu'āwamah*.[59] In his work *Nayl al-Awṭār* (the sharecropping section of which will be studied in Chapter 5 below) al-Shawkānī explains the term *mu'āwamah* as *bay' al-sinīn* (lit. the sale of years) which may be interpreted as the sale now of a harvest expected years ahead.[60]

Although admittedly there can be no clear-cut interpretation of these *ḥadīth*s that could entirely eliminate their prohibitory nature, nevertheless, if they are taken in their own context, and also in the light of the other *ḥadīth*s which would seem to allow sharecropping, it might be seen that what is being prohibited here is not sharecropping *per se*, but rather transactions which may result in unfairness or lead to speculation, and specifically speculation in agricultural produce.

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[58] Muslim: X, 193-96 of the Cairo (1929) edition (= *Ḥadīth*s 3707-3713 in the Siddiqi (1976) translation).

[59] Muslim: X, 196 of the Cairo (1929) edition (= *Ḥadīth* 3712 in the Siddiqi (1976) translation).

[60] Al-Shawkānī *Nayl al-Awṭār*: V, 280; Siddiqi 1976: III, 810 (*Ḥadīth* 3712).

3.4 THE POSITION TAKEN BY THE ISLAMIC LEGAL SCHOOLS

The Sunnah, one of the two cardinal *uṣūl* (origins, principles) of Islamic law, then, provides no unambiguous ruling on whether sharecropping is permissible for Muslims to practise or not. Each of the relevant *ḥadīth*s, whether prohibitory or permissive, is open to a range of different interpretations. This explains why, in the words of S.M. Yusuf, "the issue remained undecided and men of piety always felt uneasy about it",[61] and why therefore the early Islamic jurists, if they allowed the practice at all, circumscribed it with restrictions and conditions. It also explains why Louis Milliot, who seems to have been the first western lawyer to make a detailed study of Islamic sharecropping in both theory and practice, said of it, "On peut dire qu'il y a presque autant de doctrines professées que d'auteurs ayant écrit sur la question".[62] Milliot was here referring to the *muzāraʿah* but in fact his comment could well be applied to Islamic sharecropping much more generally.

It is in fact practically impossible to summarise succinctly the conditions with which jurists have circumscribed sharecropping for it to be a valid contract.[63] One reason for this is that the different Schools impose different sets of conditions and there is, moreover, no unanimity even within each School. For example, although the eponym of the Ḥanafī School, Abū Ḥanīfa (d. 150/767), ruled against the validity of *muzāraʿah*, his two eminent disciples, Abū Yūsuf (d. between 172/798 and 179/807) and Muḥammad al-Shaybānī (d. 189/804), permitted the practice as long as certain conditions were met.[64] Another reason for the difficulty in attempting to summarise the various conditions is that different types of sharecropping contract are considered differently, and in particular a basic distinction is made between *muzāraʿah* and *mukhābarah* on the one hand and *mughārasah* and *musāqāh* on the other—that is to say, sharecropping in annual crops (typically grains) and sharecropping in perennial crops (tree crops and vines). The nineteenth century Ottoman Land Code (essentially a Ḥanafī document) does not distinguish between *mughārasah* and *musāqāh*, as was noted in Chapter 2 (Section 2.32 above), though most

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[61] Yusuf 1957: 32.

[62] Milliot 1911: 17.

[63] M.J.L. Young (*EI*^{2}, article "*Muzāraʿa*") gives eight conditions required for a *muzāraʿah* contract to be valid. However, he makes no allowance for the different views of different jurists and the real position is much more complex than he suggests.

[64] See, for example, Abū Yūsuf *Kitāb al-Kharāj* (trans. Ben Shemesh): 176-77.

jurists define them separately, in the manner to be discussed below. Moreover, Shāfi'ī jurists, following al-Shāfi'ī's lead, have tended to forbid *muzāra'ah* as an independent free-standing contract but have allowed it if it is part of a *musāqāh* contract, a point which will also be taken up below (in Chapter 4).

Comparing the *mughārasah* and the *musāqāh*, the essential distinction between them which most jurists tend to make is that in the *mughārasah* contract, the sharecropper is leasing the landowner's land as a tenant, whereas in the *musāqāh*, the landowner is hiring the services of a sharecropper as a labourer, as was mentioned in Chapter 2 (Section 2.32). In the *musāqāh*, the owner of the land will also own the trees which will usually be already mature when the contract is made. In the *mughārasah*, however, the responsibility of both supplying and planting the trees will frequently lie with the sharecropping tenant. In return, not only will he receive a share of the eventual produce of the trees, but also, often, he will acquire ownership of part of the land. This is justified by the fact that such contracts will inevitably last many years without any return of fruit for the tenant-planter since he must wait for the trees to mature. *Mughārasah* contracts of this type (where the tenant-planter supplies the young trees and acquires part of the land) would seem to have been particularly favoured by the Mālikī School, since it is well documented that in Mālikī North Africa large areas of previously uncultivated land were planted with fruit trees, especially olives, between the end of the nineteenth century and the Second World War by means of *mughārasah* partnerships between the colonial landowners and the Arab farmers, and it was the latter who supplied the young trees and received ownership rights in the land in return.[65] As will be seen in the next section (Section 3.5 below) the Yemeni Civil Code (*al-Qānūn al-Madanī*) too allows for this type of *mughārasah*.

It will be the task of Chapters 4 and 5 to discuss the views of specifically the Shāfi'ī and Zaydī Schools on sharecropping. Here only a brief appraisal of some basic differences will be given in the approaches of the different Schools to the practice.[66] Generally speaking,

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[65] See especially Rectenwald 1930: 75-79; and also Milliot 1911: 34-61 and 100-29; Abribat 1934: 121-25; and Roussier-Théaux 1935: 129-35. The French term for such *mughārasah* contracts as used in these references is, significantly, *bail à complant.*

[66] The following summary owes much to the detailed account provided by al-Jazīrī (1969: III, 1-33) of the position on the *muzāra'ah* and *musāqāh* taken by the four Sunnī Schools.

all the four Sunnī Schools and the Zaydī and other Shī'ah Schools have less difficulty accepting the validity of sharecropping contracts on land planted with perennial crops and requiring irrigation (that is to say, *musāqāh* contracts) than contracts on annually sown land (that is, *muzāra'ah* contracts).[67] On the theoretical level the justification which the Schools cite is the Khaybar *ḥadīth*s already discussed above. On a more pragmatic level it is tempting to see at least part of the reason in the fact that to estimate a future harvest on irrigated land, especially that planted with perennial tree crops (such as date-palms or vines), is more certain and therefore has less risk inherent in it than to estimate the harvest on land which has not yet been sown. As will be seen in Chapter 4 (Section 4.2), none other than the great al-Shāfi'ī himself cited this pragmatic reason for accepting *musāqāh* but rejecting *muzāra'ah*.

Concerning *muzāra'ah* contracts, there is in fact a notable divergence in approach between the Schools on the theoretical level. The majority of both the Ḥanbalīs and the Ḥanafīs allow *muzāra'ah* as an *ijārah* (renting or hiring) contract whether it is renting land for part of the produce or hiring a labourer whose wage will be part of the produce. In both cases such contracts are heavily circumscribed with conditions, including the stipulations that the shares of each party to the contract must come from the whole of the land and not a certain specified part of it and must be stated in terms of a proportion of the total crop and not as an absolute measure. Both of these stipulations are clearly based on the restrictions found in the sharecropping *ḥadīth*s already discussed (Section 3.3 above).

The majority Shāfi'ī view on *muzāra'ah* contracts is different in that both renting land for a part of the produce and hiring a labourer for part of the produce are in principle considered forbidden because of the existence of *gharar* (risk) and in particular the detriment such *gharar* could cause to the labourer. If, for example, no crop at all is produced, then the labourer will have been placed in the iniquitous position of having worked for no wage. Most Shāfi'īs therefore regard *muzāra'ah* contracts as invalid—though even here there is an exception. The method by which a *muzāra'ah* contract can be considered valid, according to most Shāfi'īs, is when it is an integral part of a *musāqāh* contract. That is to say, if a *musāqāh* contract is concluded for a piece of land under date-palms or other irrigated perennial crops it

[67] Cf. Løkkegaard 1950: 174.

can contain within in it a *muzāra'ah* contract which will allow the labourer to sow land under, between and beside the trees.[68]

Most Mālikīs on the other hand validate sharecropping not as an *ijārah* contract but as a form of *sharikah* (partnership) contract and therefore very similar in its conditions to *muḍārabah* (commercial partnership). Each partner receives his share from the enterprise as *ribḥ* (profit) in proportion to his investment, and the problem of renting the land for an unknown *ujrah* (rent) or hiring a labourer for an unknown *ajr* (wage) does not arise. The Mālikī conceptualisation of sharecropping as a partnership is fully borne out by the practical example given above concerning the use of *mughārasah* contracts in establishing olive plantations in North Africa: in these contracts the planter-tenant is far from being a hired labourer. He is in fact a fully operating and fully contributing partner with the landowner and is rewarded commensurately.

As for the Zaydīs, the Shī'ah School of most importance in modern Yemen, their view would seem to be the most pragmatic of all. The relevant sections of the Zaydī *fiqh* works *al-Baḥr al-Zakhkhār* of Ibn al-Murtaḍā and the *Nayl al-Awṭār* of al-Shawkānī will be examined in detail in Chapter 5. Here it need be said only that the Zaydīs permit all three major types of sharecropping contract (that is, *muzāra'ah* as well as *mughārasah* and *musāqāh*) and the conditions with which they circumscribe the contracts are notably much less onerous than those stipulated by, for example, the Shāfi'īs.

All the Schools therefore allow sharecropping to some extent. Equally however all stipulate conditions surrounding matters such as whether the contract should be for a fixed period of time; which party to the contract is to supply the seed and the *ālāt al-zar'* (the agricultural implements and any animals necessary for ploughing, harvesting, and so on); whether the tenant or labourer should be required to perform duties additional to the ploughing of the land and the sowing, tending and harvesting of the crop; and how he should be recompensed for any permanent structures (new water channels or cisterns, or terracing, for example)—but insofar as they concern the Shāfi'ī and Zaydī Schools these detailed matters will be given further consideration in Chapters 4 and 5 below.

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[68] The Shāfi'ī view, as exemplified by al-Shāfi'ī himself and by al-Nawawī, will be examined in detail in Chapter 4.

3.5 SHARECROPPING IN THE YEMENI CIVIL CODE *AL-QĀNŪN AL-MADANĪ*

It will be shown later in Chapter 6 (in particular in Section 6.4) that sharecropping is by far the most widespread form of agricultural tenancy in the Yemen. It is not surprising therefore that the Yemeni Civil Code (*al-Qānūn al-Madanī*) should address the practice. The Code was promulgated by the government of the (then) YAR as Laws 10 and 11 of 1399/1979 (comprising Books 1 and 2 of the Code) and Laws 16 and 17 of 1403/1983 (comprising Books 3 and 4), and as such can be considered an example of modern statute law in an Islamic country. However, the opening of Book 1 which sets forth the principles on which the Code is based clearly states that its basis is the Islamic *Sharī'ah* and the *Uṣūl al-Fiqh*.[69]

The Articles in the Civil Code relevant to sharecropping contracts, eleven in number, are Articles 733 to 744 inclusive and are found in Book 3 (which deals with Contracts, *'Uqūd*), Part II, Chapter 1 (on Leasing, *Ijārah*), in which they constitute Section 4 entitled *al-Mughārasah wa-al-Muzāra'ah wa-al-Musāqāh* (pp.79-81). The *Mughārasah* forms Subsection 1 (Articles 722-736: 79-80) while the *Muzāra'ah* and the *Musāqāh* are grouped together in Subsection 2 (Articles 737-741 for the *Muzāra'ah* and Articles 742-743 for the *Musāqāh*). Subsection 3 consists of only one Article (Article 744) which applies to both the *Muzāra'ah* and the *Musāqāh*).

Each Article is provided with an "Explanatory Note" (*mudhakkirah īḍāḥīyah*) placed after the end of Book 4 (pp.317-20), though in many cases these notes do not advance very much the depth of one's understanding of the Articles, since they often merely restate in similar or even identical words what the original Article states.

The text of the Articles together with their Explanatory Notes is given in full in Appendix 2 for reference.[70] What follows here is a summary of the contents of the Articles and a discussion of them.

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[69] *Al-Qānūn al-Madanī*: I, Articles 1 to 21 (pp.17-20).

[70] A full translation into English has been considered unnecessary here. The language of the Code is modern Arabic and poses no real problem of comprehension when the terminology of sharecropping is known. The two or three misprints in the original printed text have been noted and corrected in Appendix 2.

3.51 The Articles on the Mughārasah *(733 to 736)*

The purpose of Article 733 is to outline the situation in which a *mughārasah* contract would be valid and the main points may be summarised as follows:

- *Mughārasah* contracts involve a perennial crop.[71] The Explanatory Note gives as examples date-palms and grape-vines (a clear recalling of the Khaybar *ḥadīths*).
- The type of plants is to be specified.
- The tenant (*ajīr*) is to provide the plants and tend them until the fruit is produced. The Explanatory Note refers to the tenant also as *ghāris* (literally planter, especially of trees).
- The rent may be either part of the land or part of the harvested fruit (or, presumably, a combination of both).[72]
- Neither party may annul the contract without the consent of the other.

The Explanatory Note justifies *mughārasah* contracts by invoking *maṣlaḥah* (public welfare or benefit) and states that the *ijmā'* unanimously declares them valid because of the *ḥadīth* from Ibn 'Umar concerning Khaybar.

Article 734 states what the position would be if a *mughārasah* contract is found to be invalid because one of its conditions is defective. In such a case, any trees which have already been planted would belong to the tenant (*ghāris*) (who supplied them in the first place) and he would pay the landowner a rent commensurate with the period of time his trees had occupied the land. The tenant would then have two choices: he could either uproot the trees, or he could leave them standing and claim their value from the landowner.

The following Article, 735, would seem to be curiously placed here since it concerns the law of trespass or usurpation rather than the regulation of the *mughārasah*. The Article states that if anyone plants or builds on a plot of someone else's land without the owner's permission, then the plants or buildings must be removed by the person who

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[71] *Shajar la-hu aṣl thābit*: literally, trees which have firm or established trunks/roots.

[72] The possibility that a share of the land can be made over to the tenant in a *mughārasah* contract (instead of, or as well as, a share of the produce) is significant and recalls the remarks made in the previous Section (3.4) concerning contracts of this type in North Africa.

put them there, and that person must also pay the landowner a commensurate rent and an indemnity.

Article 736, the final Article in the section on the *mughārasah*, states simply that any aspect of the contract not covered by the previous Articles is to be referred to local custom, the *'urf al-jihah* (the custom of the district). The statement is significant in highlighting the relationship between Yemeni statute law, as exemplified by *al-Qānūn al-Madanī*, and the *'urf*: where statute law has nothing to say, it is customary law which is applied.

3.52 The Articles on the Muzāra'ah *(737 to 741)*

Article 737 outlines the conditions under which a *muzāra'ah* contract is valid, and these can be summarised as follows.

- *Muzāra'ah* contracts involve leasing land to a tenant (*ajīr*) who will cultivate it by sowing (*zar'*).
- The plot of land, the type of seed and the length of the period of the contract must all be specified.
- The contract may be annulled only in one of the following three situations:
  - both parties agree to the annulment;
  - the tenant fails to meet the conditions of the contract;
  - the tenant refuses to hand over the rent.

The Explanatory Note adds that *muzāra'ah* contracts have been deemed valid by "the committee" (*al-lajnah*, presumably the committee of Yemeni legal experts which drew up *al-Qānūn al-Madanī*) even though the rent is expressed as a proportion of the harvest. The justification given by the Explanatory Note is, once again, the *ḥadīth* recounted from Ibn 'Umar concerning the Prophet's deal with the Jews of Khaybar, and that contracts of the *muzāra'ah* type were practised by Muslims throughout the Prophet's lifetime and the reigns of the Rāshidūn caliphs.[73]

Article 738 is concerned principally with the conditions under which the *muzāra'ah* contract may be terminated. Briefly, these are stated as follows, and in each case the landowner would have the right to remove the tenant (*ajīr*) from the land.

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[73] The relevant *ḥadīth*s have been discussed already in Section 3.3 above. The Rāshidūn caliphs are the first four caliphs (Abū Bakr, 'Umar, 'Uthmān and 'Alī), whose reigns covered the period 11-41/632-661.

- The tenant breaks the rules as set by custom (*idhā khālafa al-'urf*).
- The tenant neglects or abandons his duties or infringes the conditions of the contract.
- The tenant is unable to work (presumably, though this is not stated, because of old age or ill health and so on).

In return, the tenant has the right to be recompensed for the labour he has expended.

The Article then states that after the harvest either party has the right to terminate the contract provided the other party is notified in good time. The Explanatory Note adds that if the length of the *muzāra'ah* contract has not been specifically declared it would run for a single crop (*zar'ah*), that is to say, normally one year, and would end after the crop had been harvested, unless renewed by both parties. In cases where there are more than one harvest per year, as with vegetables and the like, the Article indicates that procedures should be governed by custom (*'urf*).

Article 739 is a straightforward prohibition of leasing land to a tenant (*ajīr*) to cultivate for the landowner when the tenant's remuneration is the crop from another piece of land also worked by the tenant. The Explanatory Note calls this type of arrangement the *mukhābarah* and quotes as the justification for its prohibition the *ḥadīth* recounted from Ibn 'Umar.[74]

Article 740 simply states that the tenant (*muzāri'*) may not desert the land nor sub-let it to someone else without the permission of the landowner.

The final Article dealing specifically with the *muzāra'ah*, Article 741, concerns the situation where the tenant (*ajīr*) decamps after he has ploughed and tilled the land but before he has sown it. Normally he will have no right to be compensated for the labour he has expended, since, as the Explanatory Note clarifies, he will have failed to have met the conditions which the contract has imposed on him. He will have the right to compensation for his labour however if the contract turns out to be invalid through the deficiency of one of its conditions.

[74] The various versions of this *ḥadīth* have been discussed in Section 3.3 above under the subsection "The Rāfi' *Ḥadīth*s".

3.53 The Articles on the Musāqāh *(742 to 743)*

Article 742 outlines what constitutes a valid *musāqāh* contract. In it the owner of trees (*gharas*) or other crops (*zar'*) hires a labourer (*'āmil*) to irrigate them and carry out such other duties as are necessary to look after them. The Explanatory Note refers to the labourer as *musāqī* ("irrigator") as well as *'āmil*, and it adds that the amount of the hire (*ujrah*) is a proportion of the produce from the land. The contract may be annulled only in the following circumstances:

- with the consent of both parties;
- negligence or infraction on the part of the labourer;
- failure on the part of the owner to fulfil his responsibility to pay the labourer his hire.

If the contract itself is found to be deficient before the labourer had started work because one of its conditions is invalid, then it is simply annulled. If the labourer has already started work, then he has the right to be recompensed in a measure equivalent to the labour he has expended.

Article 743 states that the labourer (*'āmil*) is forbidden to abandon his duties to someone else except with the permission of the owner, and it is therefore essentially the same as the prohibition in Article 740 concerning the *muzāra'ah*.

3.54 The Article relevant to both the Muzāra'ah *and the* Musāqāh *(744)*

Article 744, which applies to both the *muzāra'ah* and the *musāqāh*, concerns disagreements which may arise between the two parties. The first involves the *ujrah*, the rent in the case of the *muzāra'ah* or the hire or wages in the case of the *musāqāh*. Where no evidence exists to support either party, then such disagreement is to be resolved in favour of the party who claims the lower amount. The second concerns a dispute over what the tenant or labourer may or may not do. In such a case the landowner will have the decisive say.

3.55 Observations on the Sharecropping Articles in al-Qānūn al-Madanī

The vocabulary employed in the above Articles for the two parties and their relationship with each other indicates the attitude of *al-Qānūn al-Madanī* to the nature of each of the types of contract and in particular to the distinction the Code makes between the *mughārasah*, the *muzāra'ah* and the *musāqāh*. In the *mughārasah* the landowner (*mālik al-arḍ*) hires or engages (*yasta'jir*) a tenant (referred to as *ajīr* or

sometimes *ghāris*). In the *muzāraʿah* the landlord (referred to as *rabb al-arḍ*, though there is likely to be no significant difference between this term and *mālik al-arḍ*) leases or rents out a piece of land (*yuʾajjir arḍ*[m]) to a tenant (here also referred to as *ajīr* or sometimes *muzāriʿ*). At one point (Article 740) the landlord is referred to as the lessor, *muʾajjir*. In the *musāqāh*, the owner is not referred to specifically as the landowner (though he is likely to be that as well) but rather as the owner of the trees or crops (*mālik gharas aw zarʿ*), and he hires (*yastaʾjir*) an "agent" who is effectively a labourer (*ʿāmil*, which the Explanatory Note to Article 742 refers to also as *musāqī*, literally irrigator).

In short, then, the Yemeni Civil Code regards all three sharecropping contracts as *ijārah* (leasing, renting or hiring) contracts (indeed, Chapter 1 of Part II of Book 3 in which the Articles on sharecropping are found deals with *ijārah*), rather than as *sharikah* (partnership) contracts on the analogy with *muḍārabah* as discussed in Section 3.4 above. However, there are differences in approach to the three types of contract according to which party is leasing or hiring and what or who is being leased or hired. The three situations are summarised in Table 3.1.

Table 3.1. Relationships between Lessors and Lessees in Sharecropping Contracts as viewed by the Yemeni Civil Code

Name of Contract	Party leasing or Party hiring	Thing being leased or Party being hired
mughārasah	Landowner (*mālik al-arḍ*)	Tenant-Planter (*ajīr* or *ghāris*)
muzāraʿah	Tenant (*ajīr* or *muzāriʿ*)	Land (*arḍ*)
musāqāh	Owner of plants [and land] (*mālik gharas aw zarʿ*)	Labourer (*ʿāmil* or *musāqī*)

As the table shows, in the case of the *mughārasah*, the landowner is hiring or engaging a tenant (to plant the land with trees, and, moreover, to supply the trees, and possibly benefit from ownership of a share of the land at the end of the contract). In the *muzāraʿah*, the

tenant is renting land from the landowner. In the *musāqāh*, on the other hand, the owner is hiring a labourer, and the situation differs from that of the *mughārasah* in that the *musāqāh* labourer is contracted to provide nothing but his labour. In the case of both the *mughārasah* and the *muzāraʿah* the engaged person is distinguished by the term *ajīr* (tenant). These distinctions will be met again when Yemeni sharecropping contracts are examined in more detail in Chapter 8 (Section 8.3). Notwithstanding the distinctions, however, the recompense (expressed as a proportion of the harvest, of course) is referred to in all the Articles as *ujrah*, whether meaning rent or wage.

The way the three kinds of contract are grouped is also undoubtedly significant. Instead of the more usual grouping of *muzāraʿah* on the one hand against *mughārasah* and *musāqāh* on the other (which, in the case of at least the Ottoman Land Code, is so marked that the latter two have completely coalesced, as has been mentioned above in Section 3.4), the Yemeni Civil Code makes *mughārasah* stand separately in its own subsection, and groups *muzāraʿah* with *musāqāh* in a separate subsection. This is likely to be because of the special position the tenant in a *mughārasah* has, as outlined above, when compared with the tenant or labourer in the other contracts. The grouping may possibly also reflect Shāfiʿī influence, in that the only valid form for a *muzāraʿah* contract is when it is an integral part of a *musāqāh* contract, as will be discussed in more detail in Chapter 4. Since however the Civil Code allows *muzāraʿah* as a free-standing contract without any stipulation that it must be tied into a *musāqāh*, as the Shāfiʿīs would have it, it can by no means be regarded as a Shāfiʿī document. Instead, pragmatic Zaydī influence would seem to show quite visibly in these sharecropping Articles.

A subsidiary point of interest can perhaps be made which concerns problems and disputes that may arise during the term of the contract. It would seem clear that the Yemeni Civil Code gives more prominence to possible shortcomings on the part of the sharecropper than any on the part of the landowner. Although it is stressed in all three contracts that if the contracts are validly concluded then the contractual conditions are binding on both parties (Articles 733, 737 and 742), nevertheless the Articles dealing with both the *mughārasah* and the *muzāraʿah* place emphasis on infractions which the tenant may commit, no mention at all being made of any possible grievances the tenant may have because of the actions of his landlord. Only in the *musāqāh* (in Article 742) is a possible infringement on the part of the landowner referred to (failure to pay the labourer). This matter will be

referred to again in Chapter 8 below when contentions and their solution are discussed in the context of the Yemen.

What is perhaps as interesting as the points which the Articles include is matters which they omit. There is no mention for example of any permitted range of sharing proportions or on what basis they should be calculated. Similarly, with the exception of the stipulation that in the *mughārasah* the tenant should supply the trees, no mention is made concerning which party should provide the inputs such as the seed and the *ālāt al-zarʿ* (the necessary equipment and tools), and equally no mention of whether the tenant is responsible for transporting his landlord's share to him or whether the landlord is expected to make his own arrangements to collect his share. Another omission is any specification of whether a contract should be a written document or whether a verbal agreement is sufficient, nor on any procedure for witnessing the contract. Since these and other crucial matters are completely ignored by the Articles in the Code, it must be assumed that they should be decided by local *ʿurf*, and indeed in the *mughārasah* and the *muzāraʿah* (in Articles 736 and 738) the reader is referred explicitly to the *ʿurf* where there is no specific ruling in the Code. This also is an important point which will reappear in Chapter 8 (Section 8.3) when Yemeni contracts are discussed.

3.6 Concluding Remarks on Sharecropping in Islamic Law

After giving an explanation of some of the basic terminology and concepts of Islamic law, this chapter has sought to show the relationship of *ʿurf* to the *Sharʿīah* including the means by which and the extent to which the former has contributed to the latter, and it has also analysed in some detail the so-called "sharecropping *ḥadīth*s" which, in the absence in the Qur'ān of any direct reference to sharecropping, form the starting point for all Islamic legal discussion on the practice. As has been indicated, no unambiguous judgment can be framed from the *ḥadīth*s, which are contradictory, on the legal status of sharecropping. Nevertheless, given the discussion put forward in Section 3.3 above, it would seem difficult to escape the conclusion that the *ḥadīth*s, taken as a whole, should be interpreted as prohibiting not sharecropping *per se*, but rather only those forms of the practice which incorporate an unacceptable level of *gharar* and can lead to specu-

lation or which may be considered intrinsically unfair to either of the two parties and especially the sharecropper. This conclusion will be referred to again in Chapter 5 (Section 5.4) when it will be shown that it is also the conclusion arrived at by the (nominally) Zaydī Yemeni jurist al-Shawkānī.

The chapter has concluded with a discussion of the relevant Articles in the modern Yemeni Civil Code which deal with sharecropping, and it was pointed out that it is not surprising that the Civil Code should concern itself with sharecropping since the practice is so widespread in the Yemen, a point which will be amply illustrated in Part II below. It was shown that the three types of sharecropping contract *mughārasah*, *muzāra'ah* and *musāqāh*, are all regarded by the Civil Code as leasing or hiring contracts, though each is distinct concerning which party is doing the leasing or hiring and what or whom is being leased or hired. In this it may be contrasted not only with the strict Shāfi'ī interpretation in which only *musāqāh* and a limited form of *muzāra'ah* are allowed (though this point will be elaborated in the next chapter, Chapter 4), but also with the Ottoman Land Code which admits only two categories, *muzāra'ah* and a combined *musāqāh/mughārasah*. A further point which was made and one which will be commented on again in Part II is the emphasis the Civil Code gives to infractions on the part of the tenant or labourer while any offences the landowner may commit are hardly mentioned. A final point was that the sharecropping Articles in the Civil Code would seem to be as equally interesting for what they omit as for what they include, and this theme too will resurface in Part II when some example contracts and *fatwā*s from the Yemen are examined.

A very general overview of the positions taken by the main Islamic legal Schools has also been introduced in this chapter. It is now time to focus more specifically on the attitudes to sharecropping of the two Schools which are of principle concern in the Yemen: the Shāfi'īs (the subject of Chapter 4) and the Zaydīs (Chapter 5).

CHAPTER FOUR

THE SHĀFI'Ī POSITION ON SHARECROPPING

4.1 INTRODUCTORY REMARKS

As was mentioned in Chapter 1 (Section 1.3), the majority of the population in the west and south of the Yemen adhere, in theory at least, to the Shāfi'ī School of Islamic law. The intention of this chapter is to study in some detail the Shāfi'ī position on sharecropping. The sections on sharecropping in two works, both basic to the thinking of the School, have been selected for this: the *Kitāb al-Umm* of al-Shāfi'ī himself (d. 204/820), from which the *Bāb al-Muzāra'ah* is examined in Section 4.2; and the authoritative *Minhāj al-Ṭālibīn* of Muḥyī al-Dīn Yaḥyā bn Sharaf al-Nawawī (d. 676/1277), which work has come to be one of the most respected textbooks of the mature form of Shāfi'ism and from which the *Kitāb al-Musāqāh* is studied in Section 4.3.

4.2 AL-SHĀFI'Ī ON SHARECROPPING IN THE *KITĀB AL-UMM*

4.21 Al-Shāfi'ī and his Kitāb al-Umm

The Imām Abū 'Abdallāh Muḥammad bn Idrīs al-Shāfi'ī, the eponymous founder of the third, chronologically, of the four Sunnī legal Schools, is one of the greatest and most influential thinkers and scholars of the period of initial development of Islamic law.[1] He was born in 150/767 into the Hāshimī branch of the Quraysh tribe, and so he was a relative, albeit a distant one, of the Prophet. After his early legal training at Mecca al-Shāfi'ī spent a period in Medina as a disciple of Mālik bn Anas until the latter's death in 179/796. Within a few years an allegation that he was involved in 'Alid conspiracies in the Yemen and was a secret supporter of the Zaydī Imām Yaḥyā bn

[1] The main secondary sources on which the following background information on the life, works and thinking of al-Shāfi'ī has been based are: Khadduri 1961; Schacht 1950; Schacht 1964; Brockelmann 1937-49: *Geschichte* I, 190; Chaumont *EI*[1]a (article "Al-Shāfi'ī"); and Chaumont *EI*[1]b (article "*Al-Shāfi'iyya*"). Reference has also been made to Yāqūt's *Mu'jam al-Udabā'* (VI, 394-95).

'Abdallāh who was claiming the caliphate, caused al-Shāfi'ī to be deported to Iraq, and he was put on trial in 187/803 before the 'Abbāsid Caliph Hārūn al-Rashīd (*reg.* 170-193/786-809). As a result of his impressive self-defence he was befriended by the great Ḥanafī jurist Muḥammad bn al-Ḥasan al-Shaybānī (d. 189/804), the disciple of both Abū Ḥanīfah and Abū Yūsuf, who according to some authorities helped secure al-Shāfi'ī's pardon, and by 194/810 he had established himself as a teacher in Baghdad.

Armed now with first hand experience of the thinking of both the Ḥijāzī-based Mālikī School and the Iraqi jurists represented by the Ḥanafī School, he decided to leave Baghdad in 198/814. It would seem at least likely that, given his earlier imprisonment, al-Shāfi'ī had resolved to avoid any further involvement in politics and devote himself wholly to the law. After a brief spell of teaching at Mecca where he is reputed to have impressed Aḥmad bn Ḥanbal (d. 241/855, the eponym of the Ḥanbalī School) who was studying there at this period, al-Shafi'ī settled in the then political backwater of Egypt.

Al-Shāfi'ī died in Egypt in 204/820, after being physically attacked, according to a story recorded by Yāqūt,[2] by a band of Mālikīs who had been enraged by his skilful rebuttal of Mālikī reasoning. His body lies in the Southern Cemetery of Cairo, overlooked by the Muqaṭṭam Hills and only a few hundred yards from the tomb of his near contemporary Dhū al-Nūn al-Miṣrī (Abū al-Fayḍ Thawbān, d. 245/859) who is revered by Ṣūfīs. Al-Shāfi'ī's burial place has ever since been a locus of pilgrimage for his disciples and admirers, and over it Saladin (al-Malik al-Nāṣir Ṣalāḥ al-Dīn Yūsuf al-Ayyūbī, d. 589/1193) and his immediate successor Ayyūbids later built in his honour the great mosque-*madrasah* which still stands today.

Al-Shāfi'ī may rightly regarded as the founder of the first comprehensive system of Islamic jurisprudence based on the four principles of the Qur'ān, the Sunnah, the Consensus of Jurists (*ijmā'*) and Legal Analogy (*qiyās*), which are collectively called the *uṣūl al-fiqh*.[3] It was under al-Shāfi'ī that, in the words of Joseph Schacht, "legal reasoning reached its zenith".[4] Although jurists after him would argue the

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[2] Yāqūt *Mu'jam al-Udabā'*: VI, 394-95.

[3] The legal terms *ijmā'*, *qiyās*, *uṣūl al-fiqh*, together with others to follow (*'urf*, *istiḥsān*, *ra'y*, etc., which are again mentioned in the text below), have already been discussed above in Chapter 3 (Section 3.2).

[4] Schacht 1964: 45; cf. Brockelmann 1937-49: *Geschichte* I, 190.

particulars of the system he had constructed, few would take issue with the overall formulation.

His position relative to the Mālikīs on the one hand and the Ḥanafīs on the other has been summed up by Brockelmann who says of him, "His *madhhab* attempted to reconcile Mālik's dependency on the Traditions with the principle of *ra'y* (personal opinion) held by Abū Ḥanīfah".[5] Al-Shāfi'ī certainly saw no place in Islamic law for custom (*'urf*), in marked denial of the position adopted by the Mālikīs, while in contrast to the Ḥanafīs, al-Shāfi'ī's approach was to deny on principle any place in law to discretionary or arbitrary decisions and opinions (*istiḥsān, ra'y*) and to limit analogy (*qiyās*) to only that which is strict and systematic. For these reasons his rulings and those of the followers of his School tend often to be more stringently dependent on a narrow interpretation of the Qur'ān and the Traditions than those of other Schools. As will be shown, this stringency is to be seen in al-Shāfi'ī's attitude to sharecropping contracts.

Al-Shāfi'ī's thinking and that of the School he founded is of particular importance in the Yemen since the largest part of the country by both area and population has traditionally owed loyalty to that School. The parts of the Yemen which have been historically Shāfi'ī are largely coincident with what has been called in Chapter 1 (Section 1.3) "Lower Yemen" which comprises, roughly, the west, the centre and the south. Therefore most of the Yemen, in theory at least, is now, and indeed has been for many centuries, Shāfi'ī in its religious outlook.

Al-Shāfi'ī's literary output is said to have included over 100 works on law,[6] of which only a few remain extant. Of these, *Kitāb al-Umm* and *al-Risālah* are the two best known.[7] The *Risālah* was the first systematic study of the sources of jurisprudence (the *uṣūl al-fiqh*).[8] As such the work was extremely influential among later generations of jurists, not only within what became the Shāfi'ī School but also in the other

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[5] Brockelmann 1937-49: *Geschichte* I, 190. Brockelmann's original words are: "Sein Madhab suchte zwischen der überlieferungstreue Māliks und dem Ra'yprinzip a. Ḥanīfas zu vermitteln".

[6] Baker and Edge 1990: 144.

[7] Khadduri 1961: 40 ff.

[8] There is also his *Tartīb al-Musnad* in which he collects together under systematic headings the *ḥadīth*s together with their *isnād*s (chains of transmitters) that he refers to in the *Kitāb al-Umm*.

legal Schools. Aḥmad bn Ḥanbal, for one, is known to have regarded al-Shāfi'ī's *Risālah* very highly.[9]

The *Kitāb al-Umm*, which is considered by some as al-Shāfi'ī's *magnum opus*,[10] is in fact a collection of most of his later Egyptian writings. They were collected, probably by his disciples, into nine books, most of which are of a polemical nature and concern al-Shāfi'ī's disagreements with other eminent jurists of his day. The least polemical of the nine books is Book 7, entitled *Ibṭāl al-Istiḥsān* (the Invalidation of Discretionary Opinion), a title which refers to al-Shāfi'ī's rejection of this form of reasoning as a basis of the law, an outlook which has already been mentioned above. It is in this seventh book of the *Kitāb al-Umm* that is to be found systematic discussion of particular legal questions and subjects. It is therefore the chapter on sharecropping (entitled *Bāb al-Muzāra'ah*) in the *Kitāb al-Umm* which has been chosen for study here as the most concise statement of al-Shāfi'ī's own thinking on the subject. The edition used here is the 1321-26[/1901-06] Būlāq edition.[11]

4.22 A Synopsis of the Bāb al-Muzāra'ah *with Comments*

Al-Shāfi'ī begins his chapter on sharecropping with a short statement of two forms it might take: first, *muzāra'ah* in which the plot of land alone is handed over to the labourer with a sharing proportion of a half, a third or a quarter of the harvest, and second, what al-Shāfi'ī calls here *mu'āmalah* (deal, dealing) in which it is date-palms or other trees which are being handed over, for a half or more or less of the harvest. This *mu'āmalah* clearly refers to *musāqāh* sharecropping contracts, and although this term is not used by al-Shāfi'ī at this point it is clear that his use of the *muzāra'ah* in the title of the chapter is intended to encompass all forms of sharecropping and not just the *muzāra'ah* proper.

He then states that Abū Ḥanīfah[12] declared all such sharecropping contracts invalid (*bāṭil*) on the grounds that "[the landowner] has hired [the labourer] against something which is unknown (*majhūl*)"

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[9] Khadduri 1961: 42.

[10] Baker and Edge 1990: 145.

[11] In this Būlāq edition *Bāb al-Muzāra'ah* is found in Vol. VII, 101-02. As far as can be established, no complete translation of the *Kitāb al-Umm* into a western European language has been published.

[12] Abū Ḥanīfah: d. 150/767, which incidentally was the year of al-Shāfi'ī's birth; eponym of the Islamic School.

and so if there were no harvest at all the labourer would have laboured without any remuneration. Al-Shāfi'ī then notes that Ibn Abī Laylā[13] on the other hand ruled all such dealings permitted (*jā'iz*) on the grounds of certain *ḥadīth*s, including the Khaybar *ḥadīth*s,[14] and also on analogy (*qiyās*) with the commercial profit-sharing partnership called *muḍārabah* (in which one partner provides the capital and the other the time and expertise required to invest the capital in a business deal, the proceeds of which are then shared on an agreed basis between the two parties). Since, Ibn Abī Laylā's argument goes, three of the Companions ('Umar bn al-Khaṭṭāb, 'Abdallāh bn Mas'ūd and 'Uthmān bn 'Affān) involved themselves in such contracts, there can be no objection to *muḍārabah*. Since, further, two Companions (Sa'd bn Abī Waqqāṣ and again Ibn Mas'ūd) used to grant their land for a third or a quarter of its produce, the implication is that sharecropping may be lawfully practised, under some circumstances at least, on analogy with *muḍārabah*.

Al-Shāfi'ī now states his own view in which he distinguishes sharply between land with and land without perennial crops:

> If one man hands over to another man date-palms or grape-vines in which he is to work on the understanding that the labourer gets a half or a third of the fruit or some other proportion of [the fruit] which the two [parties] have fixed mutually as a condition, then this *musāqāh* is the legitimate [contract] by which the Messenger of God (may peace be upon him) dealt with the people of Khaybar.
>
> If [however] a man hands over [a plot of] *arḍ bayḍā'* (land on which there are no perennial crops) to another man on the basis that the latter cultivates it—[that is,] the plot of land—and one part of anything which God causes to be produced from [the land] belongs to him, then this is the *muḥāqalah*, the *mukhābarah* and the *muzāra'ah* which the Messenger of God (may peace be upon him) prohibited.[15]

That is to say, sharecropping which involves irrigation in date-palms and grape-vines on the one hand (the contract called *musāqāh*) is valid on the grounds of the Prophet's action at Khaybar. Sharecropping on arable land with no perennial crops (*arḍ bayḍā'*, literally "white land") on the other hand is what the Prophet prohibited (according to sev-

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[13] Ibn Abī Laylā: d. 148/765, *qāḍī* of Kūfah and contemporary of Abū Ḥanīfah.

[14] The relevant *ḥadīth*s which relate that the Prophet reportedly allowed sharecropping have been examined in detail in Chapter 3 (Section 3.32 above).

[15] Al-Shāfi'ī *Kitāb al-Umm*: VII, $101_{31\text{-}32}$. The sentence which constitutes the last paragraph here is quoted *verbatim* by al-Shawkānī in his *Nayl al-Awṭār*: V, 9.

eral Traditions) as the *muḥāqalah*, the *mukhābarah* and the *muzāraʿah*.[16] As further justification of his view al-Shāfiʿī points out that we must be clear about whether actions have been permitted or prohibited. He says:

> The prohibition of what [the Prophet] has prohibited us is no more obligatory for us than the permissibility of what he has allowed us, and it is not for us to cast away one of his two Traditions for the other, nor should we declare prohibited on the grounds of that which he has declared prohibited anything he has declared permissible, in the same way as we do not declare permissible on the grounds of that which he has declared permissible something he has declared forbidden.[17]

That is to say, to paraphrase, permissibility and prohibition are equally binding and neither takes precedence. So if one action is permitted and a related action prohibited, we must accept this as being so, and we have no justification to permit both actions on the grounds that one of them is permitted, nor to prohibit both actions on the grounds that one is prohibited. In other words, a prohibition cannot be used as a *qiyās* to make an otherwise permitted action prohibited, nor *vice versa*.

It follows then that, in al-Shāfiʿī's view, Abū Ḥanīfah was wrong in judging all sharecropping prohibited simply because one form of it has been prohibited, and Ibn Abī Laylā was equally wrong to judge all forms permissible just because one form is permissible.

For al-Shāfiʿī's argument there remains now only the problem of the *ḥadīth* about the Companions Saʿd bn Abī Waqqāṣ and ʿAbdallāh bn Masʿūd leasing their arable land under a *muzāraʿah* contract. Al-Shāfiʿī's solution is to declare the Tradition unreliable despite the fact that, as he acknowledges, it concerns people so close to the Prophet. His argument here is that it is foolish to try to confirm the Sunnah of the Prophet by referring to a Tradition of some of the Companions. If certain forms of sharecropping are permitted on the grounds that they are similar to *muḍārabah*, it must be remembered that this basis for their permissibility is only an analogy and not a basic principle in its own right.

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[16] These terms *muḥāqalah*, *mukhābarah* and *muzāraʿah* have been explained in Chapter 2 (Section 2.32) of this book. Presumably al-Shāfiʿī did not hold that the term *mukhābarah* is derived from Khaybar, since the Prophet's action at Khaybar is al-Shāfiʿī's justification for the validity of *musāqāh*, and yet he states now that the Prophet forbade the contract of *mukhābarah*.

[17] Al-Shāfiʿī *Kitāb al-Umm*: VII, $102_{2\text{-}3}$.

Further, any analogy with *muḍārabah* must be strictly applied. Al-Shāfi'ī goes on to argue the strict basis for the analogy by introducing it with the rhetorical question, "How does the *muḍārabah* resemble the *musāqāh*?" He answers it by saying, in effect, that the essential characteristic of the *musāqāh* is that the thing that is being handed over to the labourer is the date-palms which are visible and extant (*qā'imah*) and which therefore can be used to derive an estimate of the size and quality of the future harvest. This argument of al-Shāfi'ī's therefore avoids the problem of an unknown quantity in the contract: the date-palms are themselves the measure of the future harvest to be shared out between the two parties to a *musāqāh* contract in the same way as the proceeds of a *muḍārabah* deal would be shared out.

If then a questioner goes on to ask, "Why cannot this also be so on [arable] land?", al-Shāfi'ī's reply is essentially that arable land which is without perennial crops and is by definition re-sown each year cannot be treated in the same way as land with perennial crops since the land cannot form a basis on which to estimate a future harvest. The only thing visible and extant at the time the contract is made is the land, and it is not the land but an as yet still unsown future crop which is to be shared.

Al-Shāfi'ī concludes the chapter by stating that even if it were to be attempted to make sharecropping on arable land permissible on the basis of analogy (with either the *muḍārabah* or the *musāqāh*—it is not entirely clear which is intended, though this point would not appear to be crucial for this part of al-Shāfi'ī's argument), this itself would not be permissible, since analogy cannot overturn a prohibition the Prophet himself has made.

4.23 Discussion

In sum, then, al-Shāfi'ī's position on sharecropping can be stated quite simply: he upholds the validity of sharecropping contracts when they involve perennial crops (following the *ḥadīth*s he allows dates and grapes in this category), and thus disagrees with Abu Ḥanīfah; but he denies the validity of sharecropping contracts when they involve annually sown arable land, and so disagrees with Ibn Abī Laylā.

The reasoning by which al-Shāfi'ī arrives at this position can perhaps be viewed on two levels. Ostensibly, his reasons are founded primarily in the *ḥadīth*s, and in particular the Khaybar Traditions, to which he refers, and secondarily on a strictly applied *qiyās* with

muḍārabah contracts. It is perhaps not impossible also that his argument can be taken at a deeper level at which one can discern a more pragmatic and humane reasoning. This is suggested by the following interpretation.

It is clear that al-Shāfiʿī regards a sharecropping contract as a contract in which a landowner hires the services of a labourer rather than as a contract in which one man leases land as a tenant from a landowner. There are three points indicating this. The first concerns the terms al-Shāfiʿī uses to indicate the sharecropper. Apart from calling him *rajul* (man), al-Shāfiʿī refers specifically to the sharecropper only twice in the *Bāb al-Muzāraʿah*—once by the term *ʿāmil* (worker, labourer, the one who does the work) and once by the term *musāqī* (irrigator under a *musāqāh* contract), and never by a term which means tenant or lessee (*ajīr*, *musta'jir*, *mustakrī*, etc.) such as are found in discussions on sharecropping in other legal works.

Second, the expressions used throughout to indicate the initial situation in such contracts are as follows:

إذا أعطى الرجلُ الرجلَ أرضاً ... *idhā aʿṭā al-rajulᵘ al-rajulᵃ arḍᵃⁿ* ...

(If/Whenever one man gives over a piece of land to another man ...);

and:

إذا دفع الرجلُ إلى الرجلِ النخلَ والعنبَ ... *idhā dafaʿa al-rajulᵘ ilā al-rajulⁱ al-nakhlᵃ wa-al-ʿinabᵃ* ...

(If/Whenever one man hands over date-palms and grape-vines to another man ...).

In these expressions the verbs are to give (*aʿṭā*) and to hand over (*dafaʿa*), rather than verbs meaning to let or to lease (*akrā*, *ajjara*, etc.) which again are common in other works by other jurists.

Third, although al-Shāfiʿī rejects Abū Ḥanīfah's conclusion that all forms of sharecropping are invalid, he does not reject specifically the reason Abū Ḥanīfah gives for this conclusion: that is, that a complete failure of the harvest would mean that the labourer would not receive any recompense for his labour.

It would indeed seem to be the case that only if al-Shāfiʿī's words are viewed in this light can the basis for the distinction he makes between sharecropping in perennial crops and sharecropping in arable land be understood in practical terms, whatever the basis in the

Traditions. In the former case of perennial crops it is possible, according to al-Shāfiʿī, to make at least an estimate of the future harvest (from the number, size and general appearance of the trees or vines), and so it can be inferred that any labourer who took on the job of irrigating and tending the crop would have some degree of certainty about how much he would receive for his work at the end of the season. In the case of arable land however there is nothing initially but the land itself bare of any plants, and therefore nothing for the labourer to base any estimate of the reward he could expect for the labour he would expend. If al-Shāfiʿī's argument is regarded in this light, then, his major concern would seem to be for the welfare of the sharecropper—or in his terms, the labourer.

It is not entirely clear why al-Shāfiʿī omitted all mention of the third main type of Islamic sharecropping contract the *mughārasah*. The most likely explanation is no doubt that the term had not emerged as a specific contract in al-Shāfiʿī's time in the late second/eighth century, even though for later lawyers it was to become one of the three principal permitted types, alongside *musāqāh* and (with restrictions) *muzāraʿah*. Presumably, if a particular *mughārasah* contract were of the type which involved the sharecropper planting saplings or palm-shoots on uncultivated land (*arḍ bayḍāʾ*), then al-Shāfiʿī would have regarded it as a *muzāraʿah* and therefore invalid. If on the other hand the trees of the *mughārasah* were already well established, then its similarity with the permitted *musāqāh* would probably be clear enough for it too to be regarded as valid by *qiyās*.

It must be said that other jurists since al-Shāfiʿī have viewed the relationship between the two parties in a sharecropping agreement in different terms and have come to different conclusions about the validity or otherwise of such types of contract in Islamic law. An examination of the attitudes of various subsequent jurists to sharecropping is indeed one of the themes of this book. The two extreme positions have in fact been introduced by al-Shāfiʿī himself in the *Bāb al-Muzāraʿah* of the *Kitāb al-Umm*, as has been shown above: in the views of Abū Ḥanīfah who denied the validity of any such contract, and of Ibn Abī Laylā who allowed all such contracts. The Yemeni Civil Code too takes a line divergent from that of al-Shāfiʿī, by allowing the *mughārasah* and the *muzāraʿah* as well as the *musāqāh*, as was seen in Chapter 3 (Section 3.5 above). The next Section (4.3) studies the views on sharecropping of the seventh/thirteenth century Muḥyī

al-Dīn al-Nawawī, probably the single most influential thinker of the Shāfi'ī School in its mature form.

4.3 AL-NAWAWĪ ON SHARECROPPING IN THE *MINHĀJ AL-ṬĀLIBĪN*

4.31 Al-Nawawī and his Minhāj al-Ṭālibīn

The Imām Muḥyī al-Dīn Abū Zakarīyā' Yaḥyā bn Sharaf al-Ḥizāmī al-Dimashqī al-Nawawī (sometimes al-Nawāwī) was born in 631/1233.[18] His birthplace was the town of Nawā, in eastern Jawlān, some 45 miles (70 km) south of Damascus, hence the *nisbah* by which he is generally known. From 649/1251 he studied in Damascus and his subsequent writings attracted the attention of the Damascus *Dār al-Ḥadīth*, the Ashrafīyah, in which he became a teacher in 665/1267 at the age of 34. He remained there until he dared to disobey the Mamlūk sultan al-Malik al-Ẓāhir Baybars (al-Bunduqdārī; *reg.* 658-676/1260-1277) by refusing to put his name to a *fatwā* declaring legal the war taxes and other exactions imposed by the Mamlūks on Syria. He eventually returned to his birthplace of Nawā and died there in 676/1277.

While still at the Ashrafīyah in Damascus, his reputation as a religious scholar of the Shāfi'ī School grew rapidly, especially after the completion in 669/1270 of his greatest work in the field of *fiqh*, the *Minhāj al-Ṭālibīn* (literally, the Path of the Searchers), which has ever since been regarded among the Shāfi'īs as one of the two or three most authoritative *fiqh* works of their School. The two later commentaries on it (the *Tuḥfat al-Muḥtāj* of Ibn Ḥajar al-Haytamī (d. 975/1567), and the *Nihāyat al-Muḥtāj* of Shams al-Dīn al-Ramlī (d. 1006/1596)) have since served as textbooks for the teaching of the Shāfi'ī *Madhhab*.[19] It is because of its standing in Shāfi'ī thinking that it has been selected here to represent the developed Shāfi'ī view of sharecropping.

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[18] The main secondary sources on which the following background information on the life, works and thinking of al-Nawawī has been based are: Heffening *EI*[2] (article "Al-Nawawī"); Brockelmann 1937-49: *Geschichte* I, 496-501; and Chaumont *EI*[1]b (article "*Al-Shāfi'iyya*").

[19] Brockelmann cites over thirty Arabic commentaries on the *Minhāj al-Ṭālibīn* (*Geschichte* I, 496-98) and he identifies numerous Mss. of it (*Geschichte* I, 496 and Supplement: I, 680).

A translation, commissioned by the Dutch colonial government in Batavia (now Jakarta, Indonesia), was published in 1883 in French by L.W.C. Van Den Berg together with his edition of the Arabic text for which he evidently used at least four separate Mss. The chapter in the *Minhāj al-Ṭālibīn* which deals with sharecropping is entitled *Kitāb al-Musāqāh* and is to be found in Volume II of the Van Den Berg edition.[20] It is this edition of the Arabic text which has been used for study here. It would appear to be clear and sound, and there are apparently only two small corrections which have to be made.[21]

As for Van Den Berg's translation, it is called "much criticised" by E. Chaumont,[22] and indeed it is easy enough to find fault. The English translation of excerpts in Section 4.32 below are the present author's own and keep much closer to the original text than does Van Den Berg's original.

4.32 A Synopsis of the Kitāb al-Musāqāh *with Comments*

Al-Nawawī's first statement concerns defining the type of situation in which a *musāqāh* contract could legally apply. First, each party must be "*jā'iz al-taṣarruf*", that is to say, legally able to dispose of his property, and if he is either too young or else insane, then his guardian would have to act for him. Such restrictions concerning minors and the insane apply throughout Islamic contract law.[23] Second, the *musāqāh* applies to date-palms and grape-vines, though al-Nawawī notes that al-Shāfiʿī included also the possibility of other types of fruit trees in his early writings.[24] As has been seen in Section 4.22 however, al-Shāfiʿī made no such supplementary possibility in his later *Kitāb al-Umm* in which he preferred to restrict the contract to date-palms and grape-vines, reflecting more literally the Khaybar *ḥadīth*s.

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[20] Al-Nawawī *Minhāj al-Ṭālibīn*: II, 143-49.

[21] These are: بفصل to read يُفصل (144_3); and الأجاجين to read الأحاجين (148_1).

[22] Chaumont *EI*[1]b, article "*Al-Shāfiʿiyya*": 188b.

[23] See, for example, Rayner 1991: 122-25. In her discussion Rayner is dealing specifically with the contract of *bayʿ* (sale), but the two primary restrictions to legal capacity (minority and insanity) apply equally in other contracts, since *bayʿ* is the Islamic contract *par excellence* on which the others have been formally modelled. See also, for example, Schacht 1964: 124-25 for the various levels of legal capacity and responsibility in Islamic law.

[24] The Arabic text reads: وجوّزها القديم في سائر الأشجار المثمّرة *wa-jawwaza-hā al-qadīm*[u] *fī sā'ir al-ashjār al-muthammirah* (143_{2-3}), in which the term *al-qadīm* refers to al-Shāfiʿī's early writings.

Although al-Nawawī is here concerned principally with the *musāqāh*, since, as has been shown above (Section 4.2), al-Shāfi'ī considered this type of contract the only type which could be valid when standing alone, he then goes on to define the difference between *muzāra'ah* and *mukhābarah*. In al-Nawawī's definition the former is where the landowner supplies the seed-corn and the latter is where the labourer supplies it.[25] He then states that both are invalid, with one exception. That exception is, in short, a *muzāra'ah* contract which is subordinate to a *musāqāh* contract and effectively an integral part of it. That is to say, as al-Nawawī puts it,

> If there is some *bayāḍ* (unplanted land) in among the date-palms, then the *muzāra'ah* is valid as part of a *musāqāh* contract over the date-palms, on condition that the same *'āmil* (labourer) is involved [in both contracts] and that it would be difficult to irrigate the date-palms separately from cultivating [the ground round about them]. The valid position is that it should be a condition that the two contracts are not separated, and that the *muzāra'ah* does not form the largest [part of the combined contracts]. [Otherwise it is not important whether] there is a large amount of bare land or a small amount.[26]

The conditions then for a *muzāra'ah* to be valid according to al-Nawawī may be summarised as follows:

1) the *muzāra'ah* must be an integral and inseparable part of a *musāqāh* contract;
2) the *'āmil* (labourer) for each must be the same man;
3) it would not be practicable to irrigate the part of the land under the *muzāra'ah* separately from the date-palms subject to the *musāqāh*;
4) the *muzāra'ah* does not dominate the combined contracts.

As al-Nawawī goes on to say, however, it is not a requirement that the fruit be shared in the same way as the grain. That is to say, the two parties may agree to divide the fruit produced from the *musāqāh* and the grain produced from the *muzāra'ah* between them at harvest in different proportions (for example, a one-third to two-thirds sharing of the dates but a fifty-fifty sharing of the grain, though

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[25] As has been seen in the discussion of the Yemeni Civil Code *al-Qānūn al-Madanī* (Chapter 3, Section 3.52 above), the distinction between *muzāra'ah* and *mukhābarah* given there (in the Explanatory Note to Article 739) is different from that adopted here by al-Nawawī.

[26] Al- Nawawī *Minhāj al-Ṭālibīn*: II, 143_6-144_4.

al-Nawawī does not give any specific example, or indeed any indication at all of how large or small shares may legitimately be).

In contrast to the *muzāra'ah*, which in this restricted situation is valid, al-Nawawī then states that the *mukhābarah* (which for him is where the tenant, not the landowner, supplies the seed-corn) can never be legally valid.

Al-Nawawī's next concern is to determine what should be done if a *muzāra'ah* contract happens to be concluded separately from a *musāqāh* contract, and therefore illegally. In such a case, he says, the harvest will belong to the landowner and he will be responsible for paying the *'āmil* a wage for his labour and any animals and equipment he has supplied, though how the harvest is gathered will be up to the two parties to decide. In other words, the same agricultural work could continue as usual, but with the *'āmil* now as a fixed-wage labourer and not as a sharecropper.

Al-Nawawī then adds two further situations in which a *musāqāh* contract would be invalid. The significance of each case is somewhat difficult to see at first sight, even when nouns are interpolated for the pronouns. The Arabic translates as follows. The *musāqāh* will not be valid if either of the following is true:

1) if [the tenant] hires out [his services to the landowner] for half the seed-corn so that he can sow the other half [of the seed-corn] for [the landowner] while [the latter] lends him half the land;
2) if [the tenant] hires out [his services to the landowner] for both half the seed-corn and the use of half the land so that he can sow the other half [of the seed-corn] on the other half of the land.[27]

What al-Nawawī is referring to here is the kind of sharecropping arrangement which partitions the crop between the landowner and the sharecropper not by proportions measured from the total crop harvested from the whole land, but rather on the basis of the parts of the crop grown on different plots of the land by assigning the produce from one plot to one of the parties and that from another plot to the other party. As was seen when the so-called Rāfi' *ḥadīth*s were discussed in Chapter 3 (Section 3.33 above), sharecropping on such a basis was forbidden specifically and unambiguously by the Prophet, and it was suggested there that the reason for the prohibition was that

[27] *Ibid.*: II, 144_8-145_4.

different parts of the land might not be equally productive. The matter is taken up by many authorities in addition to al-Nawawī: the subject is discussed at some length for example by al-Shawkānī, as will be shown in Chapter 5 (Section 5.3) when his comments on share-cropping in his *Nayl al-Awṭār* are examined.

There then follow statements of several further conditions which are necessary for a *musāqāh* contract to be valid. The first concerns the initial ownership of the crop: it should be owned in common by the two parties jointly. That is to say, it is not the landowner's sole property for him then to hand over from it the tenant's share, nor is it the tenant's sole property for him to hand over from it the landowner's share.

The second condition in this section is more complicated and has to do with the relationship between the length of contract, the period necessary for trees to produce fruit, and whether it is valid for the tenant to be asked to plant the trees himself (in which case, of course, the length of the contract would have to be several years). Although al-Nawawī does not use the term, this last possibility is clearly the kind of contract called by other authorities *mughārasah*, as discussed in Chapter 3 (Section 3.4 above). The Arabic of this passage translates as follows:

> A *musāqāh* can be validly concluded after the fruit has begun to appear as long as it is before there are signs of maturity. [However,] if [the landowner] hires [the tenant] under a *musāqāh* contract, [giving the tenant] date-palm shoots[28] for him to plant and the [mature] palms would become the property of both parties, then [such a contract] is not valid. Only if [the date-palms] are already planted [before the contract] [would it be valid] to make it a condition for [the tenant] to receive a share of the fruit as recompense for his labour, and then only if the period in which the fruit is normally produced has been specified. If this not so, then [the contract] is not valid.[29]

Here, then, al-Nawawī accepts the validity of a *musāqāh* contract shorter than one year, as long as the fruit has not already begun to mature. On the other hand, in his view a *musāqāh* contract can cover only trees which are already planted and may not involve the tenant in planting them. That is to say, a *mughārasah* contract in which the sharecropper plants the trees is invalid for al-Nawawī, even though he does not use the term. Nevertheless, he does add that some authorities do allow such contracts of the *mughārasah* type, though whether the

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[28] *Wadī*: see Lane (1863-93: 3051c).

[29] Al-Nawawī *Minhāj al-Ṭālibīn*: II, 145_6-46_3.

authorities he has in mind here are fellow Shāfi'īs or else members of other Schools is unfortunately not known since he does not name them.

Al-Nawawī then states in a straightforward manner his three last conditions for a valid *musāqāh* contract:

> [To be valid, a contract] has the following [further] conditions:
> 1) Obligations must not be placed on the *'āmil* to carry out anything that is not [directly] to do with his work [of cultivating];
> 2) [The *'āmil*] should alone be the one who is in charge of the work in the plantation;
> 3) The period of working [of the contract] must be known, in terms of, for example, "one year", or more. It would not be valid [to specify] the length of time [of the contract] by saying "[until the time] the fruit matures".[30]

His next concern is to quote the form of words to be used to make a valid *musāqāh* contract:

> The correct form [of words to make a *musāqāh* contract] is [for the landowner to say]: "*Sāqaytu-ka 'alā hādhā al-nakhl bi-ka-dhā*" (I engage you in a *musāqāh* contract over these date-palms in such-and-such a way); or else: "*Sallamtu-hu ilay-ka li-tata'ahhada-hu*" (I hand [the date-palms] over to you so that you might take care of them). Then [the *'āmil*] has to show his acceptance, without all the details of the work involved [having necessarily been named]. What is not specified in any respect is to be referred to the dominant custom (*al-'urf al-ghālib*).[31]

It will be noted from this passage that in making a *musāqāh* contract the emphasis is on the words actually spoken. That is to say, it is essentially a verbal process. The significance of this will be made clearer in Chapter 8 (Section 8.3 below) when Yemeni contracts are examined in some detail. The acceptance (*qubūl*) by the tenant is also verbal and seals the contract.

A further significant point from this passage, and one which will also emerge again when Yemeni contracts are discussed, is that the precise duties of the tenant need not be spelt out as part of the contract-making process, and that "the dominant custom" of the district is to be the arbiter of what is required of him. Nevertheless, al-Nawawī then proceeds to list what a tenant's duties are.

> It will be the responsibility of the *'āmil* to do whatever he has to do to make the fruit ripen, and in addition to carry out those things which

[30] *Ibid.*: II, 146_{5}-47_{2}.
[31] *Ibid.*: II, $147_{2\text{-}5}$.

> recur each year such as irrigating, cleaning out the water channels, keeping in good repair the *aḥājīn* [the depressions around the bases of the date-palm trunks] in which the irrigation water is kept from flowing away,[31] pollinating, clearing away grass and weeds, pruning damaged parts [of the trees], and setting up trellises [for grape-vines], according to custom (*'ādah*). Similarly, [it will be the *'āmil*'s responsibility] to protect the fruit, to harvest it and to dry it.[32]

Al-Nawawī then states what should be specifically excluded from a tenant's duties and should be carried out instead by the landowner:

> Anything which involves maintaining the trees[33] but does not recur each year, such as building walls and digging new water channels, is the responsibility of the landowner.[34]

To conclude his chapter on sharecropping al-Nawawī explains what the procedure should be in the event of any of four untoward situations occurring during the term of the contract. These situations are: a tenant who decamps; a tenant who dies; some breach of the contract on the part of the tenant; and the removal of the fruit before the tenant has received his proper share.

In the case of the decamping tenant, the landowner may voluntarily complete the work himself, but the tenant would still be held liable to pay him damages or indemnities. Otherwise, the *ḥākim*,

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[31] In Van Den Berg's Arabic text of the *Minhāj al-Ṭālibīn* the word *aḥājīn* has been wrongly printed *ajājīn* (II, 148_1), and it is translated into French somewhat misleadingly as "*réservoirs*" (II, 147). The term will be met again in Chapter 8 (Sections 8.21, 8.32, 8.52 and 8.53 below).

[32] Al-Nawawī *Minhāj al-Ṭālibīn*: II, 147_6-48_4.

[33] The Arabic here is *ḥifẓ al-aṣl*, where *aṣl* would mean either roots or trunks or both and thus "trees".

[34] Al-Nawawī *Minhāj al-Ṭālibīn*: II, 148_{4-5}. Van Den Berg's translation of the first part of this passage is unsatisfactory. The Arabic reads:

وما قُصِد به حفظ الأصل ولا يتكرّر كل سنة كبناء الحيطان وحفر نهر جديد فعلى المالك.

wa-mā quṣida bi-hi ḥifẓ al-aṣl wa-lā yatakarrar kull sanah ka-binā' al-ḥīṭān wa-ḥafr nahr jadīd fa-'alā al-mālik.

To make sense of the expression *mā quṣida bi-hi ḥifẓ al-aṣl*, the *mā* surely has to be interpreted as being the subject of the verb *lā yatakarrar* as well as that of *quṣida*, whereas Van Den Berg treats each half of the sentence as, effectively, a separate sentence: "tout ce qui sert à conserver les arbres eux-mêmes, et tout travail qui ne se répète pas chaque année ...". What, one feels like asking, can possibly constitute "everything which serves to maintain the trees themselves", if not those very things which are not repeated annually and of which al-Nawawī gives two examples? The present writer's translation eliminates this difficulty.

literally (in the field of disputes) the arbitrator, which here may perhaps be interpreted as the local governor or his legal appointee, can hire someone else to finish the work, and charge the cost to the now absent tenant. If the landowner is not able (for some unspecified reason) to take the case before the *ḥākim*, then he should at least get witnesses to testify to the sums he is having to pay another person to complete the work, if, that is, he ever wants to be recompensed by the original tenant.

If the tenant dies during the period of the contract, the procedure is simple: his heirs must complete his part in the contract, either personally themselves or else by hiring someone to do it for them.

If the tenant in some way breaches the contract, then someone can be appointed to keep a watch on him, and if this produces no improvement, then the tenant can be replaced.

Finally, if the fruit is removed for some reason before the tenant has received his proper share, then he has a right to be compensated by being given an equivalent wage in lieu.

4.33 Discussion

Unlike al-Shāfi'ī, al-Nawawī gives no initial definition for the *musāqāh*, and it must be presumed that any reader of the work will know already that the term refers to sharecropping for a share of what the land produces. Further, al-Nawawī provides no indication at all of how large or small shares may legitimately be, whereas al-Shāfi'ī does at least give examples of one-third and one-half. Such knowledge may also be assumed on the part of al-Nawawī's readers, as a result of what must have been extensive discussion among Islamic lawyers of the subject in the four and a half centuries between al-Shāfi'ī's time and that of al-Nawawī.

Also resulting from these intervening centuries is a notable development in the Shāfi'ī theory of what is valid and what invalid in sharecropping, and al-Nawawī's formulation of this is much more detailed and specific than that of al-Shāfi'ī. In particular, the distinction has been made by al-Nawawī's time between a stand-alone *muzāra'ah* contract, which, like the *mukhābarah*, is always invalid in their view, and the valid *muzāra'ah* which must be dependent on a *musāqāh* contract. No hint of such a distinction is to be found in the *Kītāb al-Umm*, as has been seen. Indeed, it has been asserted more generally

that the real founders of the developed Shāfi'ī School owed very little to the writings of al-Shāfi'ī himself.[36]

As has been seen, al-Nawawī's chapter on sharecropping includes several other detailed statements on what conditions are required for a valid sharecropping contract, together with types of contract which are not valid. The invalid contracts include, notably, those which specify that the crop sharing is to be based on partition of the land, and also those in which the sharecropper has to plant the trees himself in the first place (that is, a *mughārasah* contract, though al-Nawawī does not mention the term). Further, there are specific injunctions on what procedure should be adopted when a particular situation arises during the term of the contract such as the death or absconding of the sharecropper. In all cases, the statements and injunctions are much more detailed and specific than are found in the *Kitāb al-Umm* and may be regarded as the result of the discussion which must have taken place as the nascent Shāfi'ī School of the late second/eighth century was transformed into the mature Shāfi'ī School of the mid-seventh/mid-thirteenth century.

Al-Nawawī also gives the wording to be used to make a valid *musāqāh* contract, and, as has been remarked, the fact that it is essentially a verbal process will be shown to be significant when Yemeni contracts are considered in Chapter 8 (Section 8.3 below). It is interesting that al-Nawawī states here that the details of the duties the sharecropper must perform do not have to be declared at the time the contract is made, since they should be in accordance with local custom. Nevertheless, he does add his own list of these duties and moreover he provides a practical criterion by which the duties of the sharecropper (those which recur annually) may be distinguished from those of the landowner (those which do not recur annually). The matter of the duties mentioned in al-Nawawī's list, and perhaps more significantly duties which one could suppose must exist but which are not mentioned (such as the duty of transporting the landowner's share

[36] For example, E. Chaumont (*EI*[2]b, article "*Al-Shāfi'iyya*": 188b) says that the *fiqh* work *al-Mukhtaṣar* of Abū Ibrāhīm Ismā'īl bn Yaḥyā al-Muzanī (175-264/791-878), a disciple of al-Shāfi'ī, "has definitely greater importance than the *Kitāb al-Umm* of al-Shāfi'ī himself in the development of Shāfi'ī doctrine", and it is surely significant that even al-Nawawī does not mention any of the works of al-Shāfi'ī in a list he drew up of works of *fiqh* which had exerted in his view the greatest influence in the development of the Shāfi'ī School.

of the harvest), will appear again in Chapter 8 when contractual duties in Yemeni sharecropping are examined in detail.

4.4 CONCLUDING REMARKS ON THE SHĀFI'Ī POSITION

The purpose of this chapter has been to put forward the view of the Shāfi'ī School, the *madhhab* of the majority of Yemenis in the west, centre and south of the country, as it is found in the writings first of its founder and then of one of the most influential authorities of its developed phase. An indication of how the viewpoint was elaborated in the period of over four centuries between the two authorities has been suggested in the discussion in Section 4.33 above. Nevertheless, the basic tenet on sharecropping held by the School, which al-Shāfi'ī himself held, can be put simply enough: the *musāqāh* contract is the only type which is valid. The later development of the principle, which shows in al-Nawawī's chapter, is that a *muzāra'ah* contract can also be valid if, but only if, it is made as an integral but subordinate part of a *musāqāh* contract. All other forms, including the *mukhābarah* (in which the sharecropper provides the seed-corn), the *mughārasah* (in which the sharecropper plants the trees) and the free-standing *muzāra'ah*, are theoretically invalid for Shāfi'īs. As will be shown however in Part II below, even the proscribed forms of sharecropping are found in practice all over the Yemen, even in predominantly Shāfi'ī areas, and, moreover, an otherwise unimpeachable Shāfi'ī source to be quoted in Chapter 8 (Section 8.32 below) will be seen to aid and abet the "un-Shāfi'ī" practices by providing models on the basis of which *muzāra'ah* and *mughārasah* contracts can be drawn up.

The theoretical Shāfi'ī stance to the contractual relationship of the parties in sharecropping is clearly demonstrated in the choice of terminology both al-Shāfi'ī and al-Nawawī use, and in particular the term employed for the sharecropper, which, with the single exception of one use by al-Shāfi'ī of the term *musāqī*, is always *'āmil*. In most cases, the *'āmil* is hired by the landowner—that is to say, the landowner does the hiring. Occasionally, the *'āmil* hires himself out to the landowner. But the sharecropper is never called an *ajīr* or some other word meaning tenant and still less is he a *sharīk*, a partner with the landowner. This usage of *'āmil* for the sharecropper is reflected, as was seen in Chapter 3 (Section 3.55) above, in the Yemeni Civil Code *al-Qānūn al-Madanī* in the case of *musāqāh*, though in the Shāfi'ī works

discussed in this current chapter the same term *ʿāmil* is retained even when *muzāraʿah* and what is evidently *mughārasah* are being discussed.

Such then are some important aspects of the Shāfiʿī theory of sharecropping. It is now time to examine in similar detail how the other major School of the Yemen, the Zaydīs, views the subject, and this is the aim of the next chapter, Chapter 5. As will be seen, although the Zaydī authorities frequently quote Shāfiʿī scholars, their legal view of sharecropping differs fundamentally in several ways.

CHAPTER FIVE

THE ZAYDĪ POSITION ON SHARECROPPING

5.1 INTRODUCTORY REMARKS

In contrast to the viewpoint of the Shāfi'ī School which has adherents across the Islamic world from Egypt to south-east Asia, the Zaydī School is restricted geographically nowadays to only the northern parts of the Yemen.[1] Partly as a result of this, Zaydī opinions are perhaps less well known than those of the Shāfi'īs. It is the purpose of this chapter to examine in some detail the Zaydī approach to sharecropping by focusing on the writings of two of the School's principal proponents: in Section 5.2, al-Mahdī li-Dīn Allāh Aḥmad bn Yaḥyā al-Murtaḍā (d. 840/1437) and his *al-Baḥr al-Zakhkhār*; and in Section 5.3, Muḥammad bn 'Alī al-Shawkānī (d. 1250/1834) and his *Nayl al-Awṭār*. As will be seen, the two texts are different in nature and purpose.

5.2 IBN AL-MURTAḌĀ ON SHARECROPPING IN *AL-BAḤR AL-ZAKHKHĀR*

5.21 The Imām Ibn al-Murtaḍā

The Yemeni Imām al-Mahdī li-Dīn Allāh Aḥmad bn Yaḥyā bn al-Murtaḍā, usually referred to simply as either al-Mahdī or Ibn al-Murtaḍā, is without doubt one of the most respected and well-known authorities on the Zaydī School of Islamic Law.[2] His geneal-

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[1] The only other Zaydī "state" (if it can be called such) ever to have existed was the small Zaydī Imāmate of Ṭabaristān, south of the Caspian Sea. It lasted in some form or other from the second half of the third/ninth century until it finally collapsed early in the sixth/twelfth century.

[2] Because in Yemeni history several imāms took the title al-Mahdī li-Dīn Allāh, Aḥmad bn Yaḥyā al-Murtaḍā will be referred to here as Ibn al-Murtaḍā. The main secondary sources on which the following background information on the life and works of Ibn al-Murtaḍā has been based are: the Editor's Preface from the 1394/1975 Beirut edition of Ibn al-Murtaḍā *al-Baḥr al-Zakhkhār* (I, 15 ff.); al-'Amrī 1992a;

ogy, which includes some of the most eminent Zaydī Imāms of the Yemen, can be traced back through some twenty-four generations to 'Alī bn Abī Ṭālib and is given in full by the editor of *al-Baḥr al-Zakhkhār* in his Preface to the 1394/1975 published edition.[3]

Ibn al-Murtaḍā was born near the town of Dhamār, some 60 miles (100 km) south of Ṣan'ā' on the high plateaux of northern Yemen. The most commonly accepted year of his birth is 764/1362.[4] Orphaned in his early childhood, he was instructed in religious studies under the guidance first of his educated elder sister at Thulā, some 25 miles (40 km) north-west of Ṣan'ā', and then of several male members of his family including his maternal uncle the Imām al-Mahdī li-Dīn Allāh 'Alī bn Muḥammad bn 'Alī (d. 773/1369). During this time he came under the influence of some of the most distinguished and learned Zaydī thinkers of the day.[5]

On the death of the Zaydī ruler the Imām al-Naṣir Ṣalāḥ al-Dīn Muḥammad bn al-Mahdī 'Alī in 793/1390, when Ibn al-Murtaḍā had reached the age of 28, many of the Zaydī *'ulamā'* nominated him to succeed as Imām with the regnal title al-Mahdī li-Dīn Allāh, in preference to al-Nāṣir Ṣalāḥ al-Dīn Muḥammad's son 'Alī. 'Alī however declared himself Imām with the title al-Manṣūr. A battle ensued between the supporters of the two rival imāms which resulted in the victory of al-Manṣūr and the imprisonment in Ṣan'ā' of al-Mahdī Ibn al-Murtaḍā together with several of the *'ulamā'* who had backed him. Ibn al-Murtaḍā remained in prison for seven years from 794/1391 until 801/1398 during which he wrote several religious and other works, including the *Matn al-Azhār fī Fiqh al-A'immah al-Āthār* referred to below.

Soon after his release from prison he took refuge first at Thulā and then at Ṣa'dah (some 125 miles (200 km) north of Ṣan'ā'). There, in 816/1413, he finally renounced his claims to the Zaydī imāmate and devoted his efforts for the remainder of his life to a *jihād*, not now against the Imām al-Manṣūr, but against "*al-jahl wa-al-bid'* wa-al-

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Eagle 1994; Brockelmann 1937-49: *Geschichte* I, 187 and Supplement: II, 244-45; and Strothmann *EI*[1] (article "*Al-Zaidiyya*").

[3] Ibn al-Murtaḍā *al-Baḥr al-Zakhkhār*: I, 15.

[4] According to the editor of the 1394/1975 Beirut edition of *al-Baḥr al-Zakhkhār* (I, 15), al-Shawkānī estimated the date of Ibn al-Murtaḍā's birth as approximately 775/1373 and others have followed al-Shawkānī's reckoning. However, both that editor and Ḥusayn al-'Amrī (1992a: I, 66a) give the date as 764/1362.

[5] Ibn al-Murtaḍā *al-Baḥr al-Zakhkhār*, Editor's Preface: I, 16-18.

dalālāt" (ignorance, innovation and error).[6] He died in a plague epidemic in 840/1437, an epidemic which only two months later also caused the death of his erstwhile rival the Imām al-Manṣūr.

Ibn al-Murtaḍā left behind him a large corpus of works not only on religious matters (*uṣūl, fiqh, tafsīr, ḥadīth, zuhd*) but also on the science of language, logic and history (*'ulūm al-lughah, manṭiq, ta'rīkh*). The editor of the 1394/1975 Beirut edition of *al-Baḥr al-Zakhkhār* lists 33 titles of works by him, six of which have been published and several others of which are incorporated in *al-Baḥr al-Zakhkhār* itself.[7]

Probably his two best known works of *fiqh* (Islamic jurisprudence) are the *Matn al-Azhār fī Fiqh al-A'immah al-Āthār* and the *Kitāb al-Aḥkām min al-Baḥr al-Zakhkhār al-Jāmi' li-Madhāhib 'Ulamā' al-Amṣār fī Sā'ir 'Ulūm al-Ijtihād*, which are generally referred to by their abbreviated titles *al-Azhār* and *al-Baḥr al-Zakhkhār* respectively. Both have appeared in published form. The former, *al-Azhār*, which Ibn al-Murtaḍā wrote while imprisoned in Ṣan'ā', is a wide-ranging overview of Zaydī *fiqh* based on the work *al-Intiṣār* of Ibn al-Murtaḍā's great predecessor the Imām al-Mu'ayyad bi-Allāh Yaḥyā bn Ḥamzah bn 'Alī (669-749/1270-1349). Because of its importance as a fundamental text of the Zaydī School, many commentaries on *al-Azhār* appeared in subsequent centuries.[8]

His other great *fiqh* work, *al-Baḥr al-Zakhkhār*, has also been influential in shaping Zaydī jurisprudence and is often cited. The work is in two parts: the *Muqaddimah* (Introduction), and the *Faṣl al-Aḥkām* (the section dealing with the regulations of the law). Several Mss. of the work exist[9] and a published edition appeared in 1368 [/1948], though the text in this edition was incomplete since it lacked the *Muqaddimah*.[10] An edition of the complete text and incorporating a commentary on it called *Jawāhir al-Akhbār wa-al-Āthār al-Mustakhrajah min Lujjat al-Baḥr al-Zakhkhār* by Muḥammad bn Yaḥyā Bahrām al-Ṣa'dī (d. 957/1549) was published in 1394/1975.[11] It is this edition which

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[6] *Ibid.*, Editor's Preface: I, 20.

[7] *Ibid.*, Editor's Preface: I, 21-23.

[8] R. Strothmann (*EI*[1], Article "*Al-Zaidiyya*") has called it "the official textbook of the present day Zaidī state". Al-'Amrī 1992a (I, 96a-b) lists several of the extant commentaries on *al-Azhār*.

[9] Brockelmann 1937-49: Supplement II, 245.

[10] Ibn al-Murtaḍā *al-Baḥr al-Zakhkhār*, Editor's Preface: I, 8.

[11] Ibn al-Murtaḍā *al-Baḥr al-Zakhkhār*. Al-Ṣa'dī's Commentary consists (at least in the *Kitāb al-Muzāra'ah*) only of the expansion of the *ḥadīth*s.

has been used for the present study. As far as is known, no translation of the text into a European language has ever been published.

5.22 Observations on the Text of al-Baḥr al-Zakhkhār

That the text of *al-Baḥr al-Zakhkhār* should present difficulties for anyone but a Zaydī legal scholar to understand fully, and still more for a translator to render into English, is not surprising. It is true that it is written in grammatically correct (if rather abbreviated) *fuṣḥā* (classical literary Arabic) with few if any dialectal usages. However, as the editor of the 1394/1975 Beirut edition remarks in his Preface, Ibn al-Murtaḍā was writing "basically for experienced *'ulamā'* and not for beginners just learning".[12] The difficulties presented by the text are partly grammatical, partly terminological and partly stylistic. Grammatically, a major problem is (as often in Arabic) the assignment of pronouns to their antecedents, though the meaning will no doubt be obvious to the Zaydī legal authority. Terminologically, the interpretation of certain expressions can sometimes lead to different readings. For example, a simple word such as *al-zar'* can mean "(the act of) sowing" or "the grain" or "the standing crop" or "agriculture"—and the choice of the word in the translation will affect the meaning (as for example in lines 2-4 on p.65 of the Arabic text). A more critical difficulty however is the stylistic one. The text is written in what might be called a "legal shorthand": the author is confident that the *qāḍī* or *faqīh* reader will easily supply whatever is not explicitly stated.

Throughout the published text of the 1394/1975 Beirut edition of *al-Baḥr al-Zakhkhār*, quoted authorities are almost invariably referred to by a set of abbreviations enclosed in parentheses. These abbreviations are apparently found in Ibn al-Murtaḍā's original text.[13] The key to the abbreviations is given by the editor at the end of the final volume.[14] In the seven pages devoted to the *Kitāb al-Muzāra'ah* some thirty-two different abbreviations are used representing as many different authorities. Several of the abbreviations represent Companions of the Prophet and the Successors, as transmitters of *ḥadīth*s, including:

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[12] خطابه أصلاً للعلماء العارفين وليس للمبتدئين المتعلمين *khiṭāb-hu aṣlᵘⁿ li-al-'ulamā' al-'ārifīn wa-laysa li-al-mubtadi'īn al-muta'allimīn* (Ibn al-Murtaḍā *al-Baḥr al-Zakhkhār*, Editor's Preface: I, 9).

[13] Ibn al-Murtaḍā *al-Baḥr al-Zakhkhār*, Editor's Preface: I, 9.

[14] *Ibid.*: VI, 571-73.

ره (*rh*) for Abū Hurayrah
ع (') for Abū al-'Abbās
عم ('*m*) for 'Abdallāh bn 'Umar
عو ('*w*) for 'Abdallāh bn Mas'ūd.

Others, as might be expected for the Zaydīs, are direct descendants of 'Alī bn Abī Ṭālib. Of these the most frequently mentioned are:

ز (*z*) for Zayd bn 'Alī (d. 122/740, the eponym of the Zaydī School)
با (*bā*) for Muḥammad al-Bāqir (d. 113/731, the fifth of the Shī'ah imāms and brother of Zayd bn 'Alī)
صا (*ṣā*) for Ja'far al-Ṣādiq (d. 147/765, the sixth Shī'ah imām).

Also mentioned frequently are several of the Zaydī imāms who ruled in the Yemen. Of these latter the following are by the most commonly quoted by Ibn al-Murtaḍā:

هـ (*h*) for the Imām al-Hādī ilā al-Ḥaqq;
ى (*y*) for the Imām Yaḥyā;
م (*m*) for the Imām al-Mu'ayyad bi-Allāh;
قم (*qm*) for a statement by the Imām al-Mu'ayyad bi-Allāh (*qawl li-al-Mu'ayyad bi-Allāh*).

Unfortunately, the precise identification of these three Zaydī imāms is difficult. Before Ibn al-Murtaḍā's time there were at least three ruling imāms who had the name Yaḥyā, and as if to increase the difficulty, two of these Yaḥyās took the regnal title al-Hādī ilā al-Ḥaqq, while the other Yaḥyā adopted the title al-Mu'ayyad bi-Allāh. Among the most likely contenders are:

- al-Imām al-Hādī ilā al-Ḥaqq Yaḥyā bn al-Ḥusayn bn al-Qāsim, d. 298/910, the founder of the Yemeni Zaydī state, whom al-Shawkānī also quotes;[15]
- al-Imām al-Mu'ayyad bi-Allāh Yaḥyā bn Ḥamzah bn 'Alī, d. 749/1349, already mentioned in Section 5.21 above as author of a work on which Ibn al-Murtaḍā based his own *al-Azhār*, and a near contemporary of Ibn al-Murtaḍā.[16]

[15] See Eagle 1994; and al-'Amrī 1992b: II, 1018b.
[16] See al-'Amrī 1992c: II, 1019.

Ibn al-Murtaḍā also uses the abbreviation هب (*hb*) to mean "*al-Madhhab*" (that is to say, the Zaydī School) when he is detailing the view of his own School more generally. In addition, however, he quotes extensively the opinions of the four Sunnī Schools, the authorities of which he abbreviates as follows:

ح (*ḥ*) for Abū Ḥanīfah;
فو (*fw*) for the Ḥanafīs Abū Yūsuf (d. 182/798) and Muḥammad al-Shaybānī (d. 189/804);
حص (*ḥṣ*) for the disciples of Abū Ḥanīfah (*aṣḥāb Abī Ḥanīfah*);
ش (*sh*) for al-Shāfiʿī;
قش (*qsh*) for a statement by al-Shāfiʿī (*qawl al-Shāfiʿī*);
مد (*md*) for Aḥmad bn Ḥanbal;
ك (*k*) for Mālik bn Anas.

The *Kitāb al-Muzāraʿah* of *al-Baḥr al-Zakhkhār* is divided into three main parts. The first concerns sharecropping contracts on sown land (that is to say, *muzāraʿah* contracts proper); the second covers contracts on land with perennial crops and is entitled *Bāb al-Mughārasah*; and the third deals with contracts in irrigated perennial crops with the title *Bāb al-Musāqāh*. Within each of these parts, the word *faṣl* divides major sections and could be translated "Section". The sections are sometimes split into subsections by the word *farʿ* in parentheses.

As is frequent in works such as this, each new question or topic is introduced by the word *masʾalah* (in double parentheses) which occurs 25 times in the *Kitāb al-Muzāraʿah* and could be translated "Issue" or "Question".

As well as the use of parentheses in the cases mentioned above, quotations from the Qurʾān and the *ḥadīth*s are enclosed in double parentheses, but these, like the occasional use of commas, colons and full-stops, may well be editorial.

5.23 A Synopsis of the Kitāb al-Muzāraʿah *with Comments*

(a)The *Muzāraʿah* Proper (64-65)[17]

i) General conditions for the validity of *muzāraʿah* ($64_{1\text{-}12}$):

Ibn al-Murtaḍā opens the *Kitāb al-Muzāraʿah* with a statement of the general conditions under which a *muzāraʿah* contract is valid, *muzāraʿah*

[17] The numbers following the headings and subheadings in this Section are the page numbers of the 1394/1975 edition of *al-Baḥr al-Zakhkhār* already referred to (with line numbers where necessary in subscript).

being not only a general term for a sharecropping contract but more specifically a sharecropping contract which involves annually sown crops, typically grain crops. As has been seen above (Chapter 4, Section 4.22), al-Shāfi'ī also employed the term with both its general meaning and its specific meaning.

Ibn al-Murtaḍā states that for the *muzāra'ah* to be valid it must be regarded as a contract in which the land is held as a joint holding (*mushā'*) by both parties who then share the harvest as joint owners, and it cannot be considered as a contract in which the tenant's share of the harvest is the wage for the labour he has expended. Ibn al-Murtaḍā's terminology reflects this view: the tenant is a *muktarī* or a *musta'jir* or an *ajīr*, while the leasing is indicated by the verbs *akrā*, *ajjara* and *ista'jara*.[18] The following translates his opinion:

> I would say: The correct judgment is that leasing land held in common is valid when both [parties] divide [the harvest] among themselves as two owners would; but leasing is not valid [when the rent is calculated] on the basis of the labour [involved] in producing [the harvest], since [in this case] the tenant (*ajīr*) would be obliged to labour as a consequence of the contract—which is impossible when land is held in common. It would be as if he were being hired against something he were unable [to deliver] in the circumstance.[19]

Ibn al-Murtaḍā then adds that according to the Zaydī Imām Yaḥyā, a *muzāra'ah* contract would also be valid if half a piece of land is lent to a tenant in return for the latter's labour on the other half, or else half his labour on the whole land, and he supports this view by saying that a contract in which the supply of the seed to be used over the whole land is shared by both parties would also be valid. A situation in which a *muzāra'ah* contract would not be valid, however, is where the rent would be a share of the crop harvested from some other piece of land not included in the contract.[20]

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[18] This is, of course, a radically different approach from that followed by al-Shāfi'ī and al-Nawawī where the "tenant" is a mere *'āmil* and there is no question of the land being held in common as a joint partnership, as was seen in Chapter 4 above. This will be commented on again below.

[19] Ibn al-Murtaḍā *al-Baḥr al-Ẕakhkhār*: V, $64_{4\text{-}6}$.

[20] What he seems to be putting forward here, if the Arabic has been properly understood, is the legitimacy of a contract in which the land is partitioned into plots and the share of the harvest for the two parties is gathered from a different plot, with the sole proviso that all the plots be included in the contract. It will be remembered from the previous chapter (Chapter 4, Section 4.32) that al-Nawawī specifically prohibited this kind of sharecropping contract.

He then points out that certain named Shī'ah authorities, together with the Ḥanafīs Abū Yūsuf and Muḥammad al-Ḥasan al-Shaybānī, have allowed the *muzāra'ah* on the basis of a share of the harvest paid as wage or rent, their justification being the deal the Prophet allowed the Jews at Khaybar—and here al-Ṣa'dī's commentary expands the Khaybar *ḥadīth* in full.[21] Ibn al-Murtaḍā at this stage reserves judgement on this view, saying only *qulnā sa-ya'tī al-jawāb*, that is, he will present the opinion of the Zaydī *madhhab* later.

ii) Relations with *Dhimmī*s in land contracts ($64_{13\text{-}17}$):

Ibn al-Murtaḍā's next concern is the status of *Dhimmī*s (Jews and Christians) in *muzāra'ah* contracts and in contracts involving land more generally. He states first of all that engaging a *Dhimmī* as a tenant in a *muzāra'ah* contract is valid, because of the Prophet's deal with the Jews at Khaybar. However, according to several authorities whom Ibn al-Murtaḍā names and who include the Zaydī Imāms Yaḥyā and al-Hādī, it is invalid for a Muslim to sell agricultural land to *Dhimmī*s because, he states, the *'ushr* (tithe tax) would thereby be reduced.[22] Although he then quotes also the opposite view held by other authorities (that land, like chattels, can be sold to *Dhimmī*s), he declares that the Zaydī opinion is that land sales to *Dhimmī*s are not permitted, adding that according to the Imām Yaḥyā, if any such sales take place then they must be annulled and the money returned to the *Dhimmī* buyer, and that if the Muslim seller refuses to return the money recourse must be to the imām.

A question of interest emerging from this section is why Ibn al-Murtaḍā should mention *Dhimmī*s at all. That he should devote a fairly lengthy passage to the status of *Dhimmī*s in agricultural contracts suggests one of three possibilities, all of which are probably to some extent correct: either *Dhimmī*s were sufficiently numerous in the Yemen around 800/1400 to warrant such a discussion; or that he included the discussion only for historical and academic reasons,

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[21] The relevant *ḥadīth*s were discussed above in Chapter 3 (Section 3.32).

[22] Concerning the sale of land by non-Muslims to Muslims, Yaḥyā bn Adam in his *Kitāb al-Kharāj* gives this same reason for their prohibition—that is, the reduction in the tax (in this case, the *kharāj* land tax) which results from such sales. However, he states also that to overcome the problem, the land itself can be declared subject to *kharāj*, irrespective of the status of the person owning it. See Ben Shemesh 1958 (I, 15), and also Haque 1977 (especially 196-97, 217, 267, 291-92, 294) for the *'ushr* tax; and Løkkegaard 1950 for the difficulties of terminology of the various taxes in the early Islamic empire.

following the texts of the earliest phases of Islam; or else that he was writing for a wider Muslim audience than the Zaydīs of Yemen.

iii) Defaulting tenants (64_{17}-65_{2}):

The question which Ibn al-Murtaḍā deals with next concerns a defaulting tenant, and he states the position briefly. Following the view of the Imām al-Hādī, Ibn al-Murtaḍā asserts that a tenant must carry out the work he is contracted to do and if he defaults he is not entitled to any return.

iv) The supplier of the seed and the owner of the crop (65_{2-4}):

The next issue, which concerns the relationship between the party who supplies the seed and the party who does the sowing and which of them should be the owner of the harvest, is similarly dealt with briefly, though the point being made by Ibn al-Murtaḍā, again following al-Hādī, is not entirely clear.

v) Cultivating land belonging to orphans and *waqf* (65_{4-17}):

There then follow several points concerning inalienable land belonging to orphans or a *waqf* (religious endowment). Concerning first the question whether it is valid for someone to cultivate such land under a sharecropping arrangement, Ibn al-Murtaḍā presents two views. According to the Zaydī Imāms al-Hādī and al-Mu'ayyad, such cultivation would be valid if it is in the interests of public benefit and not solely in the interests of the cultivator himself. According to other authorities, however, the cultivator would be a usurper unless he is acknowledged to have legal trusteeship. Ibn al-Murtaḍā sides with the latter view.

The second point here concerns whether a formal contract is necessary in such cases, and again Ibn al-Murtaḍā cites two points of view. According to the Imām al-Hādī, if the cultivator observes the true owner's rights in the ownership of the harvest, then no formal contract is necessary. According to the Imām al-Mu'ayyad, however, a formal contract is essential, and draws an analogy with contracts of sale, a point of view with which Ibn al-Murtaḍā concurs.

The third point in this section concerns who should preside over the drawing up of such a contract if no imām is available. Here Ibn al-Murtaḍā states that according most authorities, including the Imāms Yaḥyā and al-Hādī, the contract should simply be drawn up before the most fitted person.

Ibn al-Murtaḍā's fourth point on this subject is to do with the case where a cultivator of land belonging to an orphan or a *waqf* knows that a legal trusteeship would be desirable but nevertheless goes ahead

without one. Again, Ibn al-Murtaḍā gives two opposing views. According to three Zaydī imāms (Yaḥyā, al-Hādī and al-Mu'ayyad), knowledge about the most desirable procedure does not affect the validity of what the cultivator does. According to other authorities however, if the party concerned believes that a legally acknowledged trusteeship is advised, then the arrangement would be invalid without one. Ibn al-Murtaḍā sides with the latter view.

To this last point Ibn al-Murtaḍā adds a view of the Imām Yaḥyā: if all parties agree, then even if they are acting in ignorance of the proper form the arrangement will remain valid, as it would in the same circumstances with a commercial transaction. Ibn al-Murtaḍā however has reservations about this view on the grounds that ignorance cannot deflect responsibility.

This concludes Ibn al-Murtaḍā's discussion of the *muzāra'ah*, and he now passes on to consider the *mughārasah*.

(b)The *Bāb al-Mughārasah*: (66-68)

i) General considerations for the validity of the *mughārasah* (66_{1-2}):

Ibn al-Murtaḍā begins his section on the *mughārasah* by saying that it is made valid in the same way as the *muzāra'ah* is made valid, and that the controversy about it lies in the fact that it is based on a share of fruit from a future harvest in the same way that the *muzāra'ah* is based on a share of grain from a future crop.

He then defines more closely the conditions under which the *mughārasah* contract is valid. These conditions concern the permitted types of crop and the specification of the plantation in question, the period of tenancy, the conditions under which the tenant will work, and the stipulation of the rent.

ii) Valid and invalid crops (66_{2-7}):

Ibn al-Murtaḍā states that, according to the Imām Yaḥyā, the *mughārasah* is valid only in the case of "trees with established trunks like date-palms and grape-vines", but not with annually-sown crops such as grain and vegetables,[23] nor even with trees which are grown

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[23] The crops he specifically excludes from the *mughārasah* are:

الزرع والبقل والكرّاث والقثاء والبطّيخ وقصب السكر والباذنجان والمرزنجوش

al-zar' *wa-al-baql* *wa-al-kurrāth* *wa-al-qithā'* *wa-al-baṭṭīkh* *wa-qaṣab al-sukkar* *wa-al-bādhinjān* *wa-al-marzanjūsh* (grain, green vegetables, leeks, cucumbers, melons, sugar-cane, aubergines and marjoram).

for their leaves rather than their fruit.[24] The justification he gives for this is a *ḥadīth* relating that "the people of the Ḥijāz work in date-palms", as so by analogy other plants which like date-palms have established trunks and are grown for their fruit can be included.

Ibn al-Murtaḍā then notes that there are two different opinions concerning whether trees which are not grown for their fruit can be the object of a *mughārasah* contract.[25] Following the Imām Yaḥyā, he says that the more correct of the two views is that the *mughārasah* is not valid with such trees since the *ḥadīth* on which the analogy is based (the deal the Prophet allowed the Jews at Khaybar) concerned only fruit-producing trees. Other authorities however (which he does not name) hold that it is valid to include such trees, since an analogy can be drawn between yielding timber and yielding fruit.

iii) Specification of the trees and the length of the lease ($66_{9\text{-}14}$):

Ibn al-Murtaḍā declares that the plantation which is to be subject to a *mughārasah* contract must be available for viewing, or else the trees in it must be described in detail in terms of their height and kind. Further, the period of the lease must be defined and that the shortest possible period is one year. Concerning the longest possible period, there are different views. According to some authorities (which he does not name) the maximum period is half the lifetime of a human being, which, because of a *ḥadīth* he cites here in abbreviated form and of which al-Ṣa'dī provides fuller forms in his commentary, can be taken to be thirty years (the full human life being, according to the *ḥadīth*, sixty years). According to other authorities (similarly unnamed), the lease period for property depends on the nature of the property concerned since different objects have different lifetimes: so, in the same way that a slave can be leased for sixty years, a beast of burden

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[24] He cites here the example of *al-tūt al-aḥmar*, "red" (i.e., black) mulberries. Presumably black mulberries were grown for their leaves, as food for silk-worms, although this is not mentioned. He goes on to say however that *[al-tūt] al-abyaḍ*, white mulberries, are allowed since it is their fruit rather than their leaves which are harvested. It must be inferred that silk-worms were not fed on white mulberry leaves, or at least that white mulberries, as opposed to the black variety, were not grown primarily for that purpose.

[25] He gives here three examples of such trees: *sayāl* (species of acacia or mimosa, including *Acacia seyal*), *ṭanab*/*ṭannub* (*Cordia abyssinica*), and *dharaḥ* (*Ficus salicifolius*). All of these are used for their timber. (See Jabalī 1993: 18 (for *sayāl*) and 49 (for *ṭanab*); also: Piamenta 1990-91: 167a, root *dh-r-ḥ*, and 308b, root *ṭ-n-b*; also Lane 1863-93: 959c, entry "*dharaḥ*"; and Varisco 1982: 500.)

for up to twenty and a house for a hundred, a piece of land can be leased for 150 years, though some authorities add here that this period depends on the kind of tree growing on the land, date-palms having, it is asserted, the longest life.

iv) Conditions of labour (66_{14}-67_{4}):

Ibn al-Murtaḍā states that it must be made clear—presumably at the time the contract is agreed—what the tenant would be expected to contribute as far as digging, ploughing, irrigating and weeding are concerned. This would appear to be directly opposed to the view of al-Nawawī, mentioned in Chapter 4 (Section 4.32 above), that the work involved does not have to be detailed at the time the contract is made and that "what is not specified in any respect is to be referred to *al-ʿurf al-ghālib* (the dominant custom)".[26]

Ibn al-Murtaḍā then adds that, according to the Imām Yaḥyā, the tenant must be allowed to get on with his work without interference from the landowner who is entitled to enter the plot only to look round. The landowner has no right to insist that the tenant hire extra labour to help him nor that he perform any service, such as working with a draught animal, which would be additional to his work in cultivating. If such conditions are placed on the tenant, then the contract is invalidated. Since the obligations of the tenant will be discussed later in this book (especially Chapter 8), a translation of the Arabic of this passage is given here in full:

> It is necessary to announce [the conditions] of labour concerning digging, ploughing, irrigating and weeding. Because the labour on [the land] is the main concern, it is a condition that the plantation be handed over to the labourer without any sharing [of joint labour] so that he can get on with [his] work night and day, while the landowner has the [right of] entry only to look around, and that the tenant be left alone to do the work, since it is not a condition that anyone else [must work] with him, nor is he obliged by any condition other than [to work] with the planted trees, such as [performing] a service [for the landowner] with a draught animal, as the effect on the contract would [in such cases] be to make it invalid. If a condition were to be placed upon [the tenant] that he hire someone to work with him, [the *mughārasah* contract] would be defective, since forcing him [to do this] would be invalid.[27]

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[26] Al-Nawawī *Minhāj al-Ṭālibīn*: II, 147_{5}.

[27] Ibn al-Murtaḍā *al-Baḥr al-Zakhkhār*: V, 66_{14}-67_{4}.

v) Stipulation of the rent (67_{4-7}):

Ibn al-Murtaḍā then cites the view of Abū Ḥanīfah and al-Shāfi'ī. The point concerns the avoidance of an unknown quantity in the contract. According to them, not only must there be information about the extent of the land under the contract and the trees on it, but the value of the rent must also be known. If the *mughārasah* is considered in terms of leasing for a rent to be paid as a share of an as yet unknown harvest then it would be invalid. Ibn al-Murtaḍā then adds it would be considered valid "only by those who maintain that the *mukhābarah* is valid" (67_{6}).

Concerning the matter of whether the plot of land must be viewed beforehand, he states further that some (unnamed) authorities allow a contract even when the land involved is not open to view, but that people prefer a situation when they can view it.

vi) The wording to make a *mughārasah* contract (67_{7-8}):

He then indicates what wording a landowner may use to engage a *mughārasah* tenant. Like al-Nawawī's formulation for the *musāqāh* examined in Chapter 4 (Section 4.32 above), it is essentially a verbal process, with the emphasis on the words spoken.

> The form [of words to make a *mughārasah* contract is for the landowner to say:] "*Ghārastu-ka*" (I engage you as a *mughārasah* tenant); or: "'*Āmaltu-ka*" (I make a deal with you [under a *mughārasah* contract]); or "*Ighris hādhihi*" (Plant this [piece of land under the terms of the *mughārasah*]). It is on this [basis] with the agreement [of the engaged party] [that a *mughārasah* contract would be valid], or some [wording] to the same effect.[28]

There then follows a section which covers a number of points concerning the duties of a *mughārasah* tenant, what happens in a case of trespass, what happens if either the tenant or the landowner dies during the period of the tenancy, and a number of other matters, some of which have already been touched on by Ibn al-Murtaḍā earlier.

vii) Duties of tenant (67_{9-10}):

Ibn al-Murtaḍā states that the *mughārasah* tenant has the duty to keep everything in good order *ḥasab al-mu'tād* (according to what is customary), but tasks not directly to do with growing, tending and

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[28] *Ibid.*: 67_{7-8}.

harvesting the crop are specifically excluded. The Arabic translates as follows:

> It is the responsibility of the tenant under a *mughārasah* contract to keep things in good order according to what is customary, to repair the wells and channels and to clean the drying floor (*jarīn*),[29] but not to build walls or purchase cows and similar jobs, [since these are] the responsibility of the landowner.[30]

viii) Desertion of tenant ($67_{10\text{-}12}$):

If a tenant deserts, the landowner is entitled to annul the contract and also to get an arbitrator (*ḥākim*) to assess any damages due to him as a result of the desertion. If there is no arbitrator available, then, Ibn al-Murtaḍā would seem to say, it is up to the landowner to do the assessment—though this last point is not completely clear.

ix) Trees already bearing fruit ($67_{12\text{-}13}$):

Since a *mughārasah* contract must involve fruit which will ripen during the course of the contract in the future, there can be no *mughārasah* contract if the trees already bear fruit when the contract is agreed.

x) Death of tenant (67_{14}):

A *mughārasah* contract is annulled if the tenant dies, since he will have been specified by name as the tenant. Ibn al-Murtaḍā here draws a parallel with renting a draught animal: if the animal dies, then the contract is annulled.

xi) Change of landownership (?) ($67_{14\text{-}15}$):

The next point is not entirely clear from the Arabic text. Perhaps the most likely meaning is that if the ownership of the land changes hands, then the *mughārasah* tenant has the right to annul the contract if he wishes to do so.

xii) Trespass ($67_{16\text{-}22}$):

If someone plants or builds on a piece of land without the owner's permission, then Ibn al-Murtaḍā indicates that there are two points of

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[29] The *jarīn* can be either the place where grain is threshed or the place where dates and grapes are dried (Lane 1863-93: 414b-c). Comparable is *mijrān* for a threshing floor in the southern Yemeni dialect (Landberg 1920-42: I, 280 (entry *j-r-n*), and Serjeant 1974: 59). In Ibn al-Murtaḍā's text however *jarīn* is more likely to mean the drying floor for drying dates, grapes and conceivably other fruit such as apricots, rather than a threshing floor, since this is a *mughārasah* contract in which grain does not figure.

[30] Ibn al-Murtaḍā *al-Baḥr al-Zakhkhār*: $67_{9\text{-}10}$.

view: either that any problems arising from the act are the responsibility of the trespasser and not the landowner, which is the view he himself supports; or else that they become the responsibility of the landowner, which is the view upheld by the Imām al-Mahdī.

Ibn al-Murtaḍā continues that according to the Imām Yaḥyā, the landowner has the right to remove anything that has been planted or built on his land by a trespasser, even if by doing so he damages it. This may be done however only with the permission of an official arbitrator if one is available. Ibn al-Murtaḍā then gives his own opinion which is that it is certainly not wrong for the landowner to remove such articles, but that he should do it without damaging them if he can.

Ibn al-Murtaḍā adds that if the landowner consents to the trespass, the situation changes, since then there would be no trespass.

xiii) Death of landowner (67_{22}-68_4):

As in the case of renting generally, a *mughārasah* contract will continue to be valid even if the landowner dies, and his heirs have no right to insist that the tenant uproots the trees he has planted under the contract or remove anything that he has built on the land. In such a case the tenant may choose between either pulling out his trees or demanding the value of them.

Ibn al-Murtaḍā then gives two conflicting points of view on the rights of heirs if a landowner who has leased land has fraudulently taken more than is legally his due and then has died before the *mughārasah* contract has expired. According to the Imām Yaḥyā and some of the Zaydī *madhhab*, and to Abū Ḥanīfah and his followers, the heirs in such a situation can cancel the remainder of the contract. According to al-Shāfi'ī, however, the heirs have no such right, and it is this latter view with which Ibn al-Murtaḍā agrees. The reason he gives would seem to be as follows, though this passage is not entirely clear. It is the tenant who is the owner of the usufruct. If fraud is being claimed then the contract can be annulled only if the landowner is still alive.

xiv) Disputes over size of rent (68_5):

According to the Imām Yaḥyā, if the two parties to a *mughārasah* contract disagree on the amount of the rent to be paid, and there is no indisputable evidence to support one side over the other, they are both still bound by the contract. Ibn al-Murtaḍā adds that the situation is the same as it would be if the contract were a contract of sale.

xv) Provision of the tenant's materials and tools of trade (68_{6-8}):

Ibn al-Murtaḍā presents two opinions on whether a *mughārasah* contract is valid if it specifies that the tenant must provide his own materials, giving as examples here the plants and any stones necessary for building on the land. According to certain authorities, including Abū Ḥanīfah and his followers, and al-Shāfi'ī, such a stipulation in the contract would not be valid, the reason given being that of *gharar* (the inclusion of something which has risk attached to it). But according to Mālik on the other hand it would be valid. Ibn al-Murtaḍā himself sides with the Ḥanafīs and al-Shāfi'ī for the same reason of *gharar*, though he points out that there are some exceptions to the general rule which are allowed by *ijmā'* (the consensus of jurists), such as the thread of the tailor, the paint of the painter and the ink of the copyist.

This concludes Ibn al-Murtaḍā's discussion of the *mughārasah*, and he now turns his attention to the *musāqāh*, which forms the final section of the *Kitāb al-Muzāra'ah*.

(c) The *Bāb al-Musāqāh* (68-70)

i) General conditions for the validity of *musāqāh* (68_{9-10}):

As with the *muzāra'ah* and the *mughārasah*, Ibn al-Murtaḍā first gives the conditions for the validity of the *musāqāh*. The crucial point he makes here is that, as in the case of the *mughārasah*, information about the land and the trees must be available at the time the contract is drawn up.

ii) The validity of expressing rent in terms of future fruit (68_{10}-69_{5}):

Ibn al-Murtaḍā gives the different views on whether the principle of expressing rent in terms of a part of a harvest which is to be produced in the future. According to some scholars, including Abū Ḥanīfah and the Imām Yaḥyā, the practice is not legitimate. According to most authorities however (Ibn al-Murtaḍā quotes the names of seventeen scholars here) it is valid, adding that al-Shāfi'ī restricted the practice to date-palms and grape-vines. Ibn al-Murtaḍā then gives his own view on this point. This is that a *musāqāh* contract is distinct from *ijārah* (leasing contracts), and so the question of quoting a rent or wage in terms of a future crop does not arise. His reasoning for this view relies on the interpretation of the Prophet's action at Khaybar. Rather than leasing the land to the Jews for a rent of half the produce, his action may be interpreted as either allowing them to keep half the produce for their sustenance, or else imposing on them the payment of half the produce as a *jizyah* tax (the capitation tax on

non-Muslims). At each point during this discussion Ibn al-Murtaḍā refers to the appropriate *ḥadīth*s, which al-Ṣa'dī expands in his commentary.

iii) Duties of tenant (69_5):

Ibn al-Murtaḍā disposes of this subject in one short sentence: the tenant (*ajīr*) is responsible for keeping the irrigation channels (*majārī al-nahr wa-al-sayl*) in good repair.

iv) The wording to make a *musāqāh* contract (69_{5-6}):

He then gives the proper form of words which may be used by a landowner to engage a *musāqāh* tenant, as he earlier did for the *mughārasah*, and again, as was seen with al-Nawawī in Chapter 4 (section 4.32), the emphasis is on the words actually used.

> [The correct form to make] a *musāqāh* contract verbally is [for the landowner] to say: "*Sāqaytu-ka 'alā hādhā al-nakhīl muddat ka-dhā*" (I engage you in a *musāqāh* contract over these date-palms for such-and-such a period), or words to the same effect such as "*Ta'ahhad lī hādhihi al-ashjār bi-al-saqy wa-al-iṣlāḥ muddat ka-dhā*" (Tend these trees for me by watering and maintaining them for such-and-such a period).[31]

v) Supplementary labourers (69_{6-8}):

He indicates that the expense of supporting extra labour can lie on either party, according to the conditions stipulated in the contract. If the parties withdraw from the contract, then the question of whose responsibility it is to support the labourers is open to two different opinions. According to some (unnamed) authorities, it lies with the tenant, since he has the overall responsibility for providing the labour for the contract. According however to other authorities (also unnamed), it is the responsibility of the landowner, on the grounds that the labourers are ultimately his servants. Ibn al-Murtaḍā sides with the latter view.

vi) Rights in specifying the plot of land and the type of seed (69_9-70_2):

Quoting the Imām Yaḥyā, Ibn al-Murtaḍā says that the right to decide how much land to include under the *musāqāh* contract lies with the landowner, though the detail of the rest of Ibn al-Murtaḍā's meaning here and his reasoning behind it are not entirely clear (69_{10-11}).

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[31] Ibn al-Murtaḍā *al-Baḥr al-Zakhkhār*: 69_{5-6}.

What is clearer however is Ibn al-Murtaḍā's next point (69_{11}-70_{2}) which concerns the choice of the type of plant to be grown: according to the Imām al-Mu'ayyad, the right to choose lies "with the one who has his hand on the land" (that is, the tenant, since he does the farming), though according to the Imām Yaḥyā, the landowner may decide. Ibn al-Murtaḍā then gives his own view in a somewhat cryptic form: to paraphrase, "If there is a disagreement about whether an article is a garment (*thawb*) or a stocking (*jirāb*), those who say it is a garment must concede to the opinion of the one who has the stocking in his hand". This presumably means that the one who does the planting is best placed to decide what plants should be grown.

vii) Disputes over size of rent (70_{2-4}):

Ibn al-Murtaḍā gives two opinions about what should happen if a dispute about the size of the rent occurs. One view is that both parties should testify under oath to the amount, but others hold that the party who maintains the higher value should be taken to be correct. Ibn al-Murtaḍā sides with the latter view.

With this Ibn al-Murtaḍā concludes his discussion of sharecropping in its several forms.

5.24 Discussion

Of the four *fiqh* texts chosen for detailed study in this chapter and the previous chapter, that of the *Kitāb al-Muzāra'ah* from *al-Baḥr al-Zakhkhār* of Ibn al-Murtaḍā is by far the most difficult to understand. As was pointed out in Section 5.22 above, the work was written with Zaydī legal scholars in mind and makes no concessions to those who are not well-read in early *fiqh*. Although for the present writer several lacunae in comprehension remain, it has nevertheless been possible to give, in the above Section, a reasonably detailed synopsis of most of the points Ibn al-Murtaḍā makes.

One feature of what Ibn al-Murtaḍā has to say on sharecropping is immediately apparent from the synopsis: it is much longer and more detailed than the passages on the subject by either al-Shāfi'ī or al-Nawawī.[32] The greater length is partly accounted for by the range

[32] Although admittedly a very imperfect measure, the number of lines of printed Arabic gives at least an idea of the length of the sharecropping passages in the various works. These are (excluding headings and subheadings which stand alone on their own lines): al-Shāfi'ī, 31 lines; al-Nawawī, 49 lines; Ibn al-Murtaḍā, 97 lines. Al-Shawkānī's chapter on sharecropping in the *Nayl al-Awṭār*, the subject of the next Section of this thesis (Section 5.3 below), is by far the longest of any of the four works

of questions taken up by Ibn al-Murtaḍā (sharecropping by *Dhimmīs* on Muslim land, sharecropping on *waqf* land, provision of the tenant's tools of trade, and so on) which are not mentioned by either al-Shāfi'ī or al-Nawawī, and moreover, in contrast to the two Shāfi'ī authorities, Ibn al-Murtaḍā covers systematically all three Islamic forms of sharecropping contract; that is to say, not only *musāqāh* and *muzāra'ah*, but also *mughārasah*, a term not actually used by either of the two Shāfi'īs but used by Ibn al-Murtaḍā, only a century or so after al-Nawawī.

The greater length of Ibn al-Murtaḍā's chapter is also the result of the many more authorities he quotes (some 32 in total). It is noteworthy that these authorities are by no means restricted to Zaydīs, even though the Imāms Yaḥyā, al-Hādī and al-Mu'ayyad are his most often quoted references. Also frequently cited are adherents of the four Sunnī legal Schools, including al-Shāfi'ī himself, and as has been noted in the synopsis given in Section 5.23 above, Ibn al-Murtaḍā often agrees with a Sunnī authority.

A number of points of disagreement between the Shāfi'īs and Ibn al-Murtaḍā can be identified, and this is so despite the fact that all the authorities base their rulings ultimately on the same *ḥadīth*s, and especially the *ḥadīth*s relating the action of the Prophet at Khaybar. The most important difference is that, for Ibn al-Murtaḍā, not only are *musāqāh* contracts valid, but also free-standing *muzāra'ah* contracts and *mughārasah* contracts—given, that is, certain stated conditions. Further, Ibn al-Murtaḍā's general attitude to sharecropping shows in the terminology he uses. Whereas with al-Nawawī the engaged party is a mere *'āmil*, a labourer, Ibn al-Murtaḍā refers to him as *muktarī* or *ajīr* or *musta'jir* (all of which may be translated as tenant), and he employs the term *'āmil* only in connection with the *musāqāh* contract. This same usage has already been seen in the Yemeni Civil Code, *al-Qānūn al-Madanī*, discussed in Chapter 3 (Section 3.5 above).

Other differences exist between al-Nawawī's interpretation and that of Ibn al-Murtaḍā, but they are more minor, such as what should happen if a tenant dies during the period of the contract: for al-Nawawī the death of a tenant means that his heirs become responsible for the completion of the contract; for Ibn al-Murtaḍā, however, the death of the tenant (in a *mughārasah* contract, at least) will mean that the contract must be annulled.

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under consideration, running to 284 lines, but, as will be seen, it is of a rather different nature from the others.

What is perhaps more surprising than the differences between the two Shāfi'ī authorities and the Zaydī Ibn al-Murtaḍā are the points they have in common. The words to be used to make a *musāqāh* contract, for example, are almost identical in the forms given by both al-Nawawī and Ibn al-Murtaḍā. Again, the lists given by both al-Nawawī and Ibn al-Murtaḍā of the duties expected of the tenant are very similar, even though the criterion each uses to define legitimate work is different: for Ibn al-Murtaḍā, the test is whether the work is integral to tending the trees, while for al-Nawawī, as was seen in Chapter 4 (Section 4.32), the criterion was whether the work recurs each year.

The point was made in Section 5.21 above that *al-Baḥr al-Zakhkhār* is a fundamental work for Zaydī thinking. To what extent Ibn al-Murtaḍā's views on sharecropping are reflected in the writings of another, more recent, Zaydī authority, Muḥammad bn 'Alī al-Shawkānī, is the subject of the next Section.

5.3 AL-SHAWKĀNĪ ON SHARECROPPING IN THE *NAYL AL-AWṬĀR*

5.31 Al-Shawkānī and his Nayl al-Awṭār

Muḥammad bn 'Alī bn Muḥammad bn 'Abdallāh al-Shawkānī was born in 1173/1760 in Ṣan'ā', hence his additional *nisbah*s al-Ṣan'ānī and al-Yamānī (also al-Yamanī).[33] His father came from Shawkān in the province of Khawlān to the northeast of Ṣan'ā' where he was a Zaydī *qāḍī*, an occupation he continued after moving to the capital Ṣan'ā'. Al-Shawkānī showed his intellectual brilliance early in his studies of Islamic law in Ṣan'ā', and after he became a *qāḍī* his *fatwā*s came to be in demand not only in Ṣan'ā' but throughout northern Yemen. His life coincided with the rule of the three Zaydī Yemeni Imāms al-Manṣūr 'Alī bn al-Mahdī 'Abbās (1189-1224/1775-1809), al-Mutawakkil Aḥmad bn al-Manṣūr 'Alī (1224-1231/1809-1816), and al-Mahdī 'Abdallāh bn al-Mutawakkil Aḥmad (1231-1251/1816-1835).[34] It was the Imām al-Manṣūr 'Alī who appointed him to

[33] The main secondary sources on which the following background information on the life and works of al-Shawkānī has been based are: al-'Amrī 1992d; and Brockelmann 1937-49: Supplement, II, 818-19.

[34] Some of the regnal dates of the Zaydī imāms in the late 12th/18th to early 13th/19th centuries are unavoidably open to differences of opinion, owing largely to the frequent periods when two or more claimants exercised control in different regions. For present purposes, al-Shamāḥī (1985: 169-70) has been relied on for the Hijrī dates, which happen to coincide with the Christian dates given by Dresch (1993: 201).

the office of Grand *Qāḍī*,[35] and in 1209/1794 at the young age of 34 he was given the title *Shaykh al-Islām*.

Before his death in 1250/1834,[36] al-Shawkānī had written more than two dozen books and essays on *fiqh*, *tafsīr* and other religious subjects, several of which have been published, and also a *dīwān* of poetry. Brockelmann lists 24 works by him and in addition a collection of his *fatwās* recorded by his son Aḥmad with the title *al-Fatḥ al-Rabbānī fī Fatāwā al-Imām al-Shawkānī*.[37] Ḥusayn 'Abdallāh al-'Amrī mentions a few other titles by al-Shawkānī not cited by Brockelmann.[38]

Probably the best known of his *fiqh* works is the *Nayl al-Awṭār min Aḥādīth Sayyid al-Akhyār [fī] sharḥ Muntaqat al-Akhbār*, of which there are at least two published editions: the 1297 (1878) Būlāq edition, and the 1973 Beirut edition.[39] The text consulted here is that of the Beirut edition of 1973. The chapter which concerns sharecropping in this edition is found in Volume VI, pp. 7-18, and is entitled *Kitāb al-Musāqāh wa-al-Muzāra'ah*.[40]

As is usual in a work of this period, punctuation is sparse. The quotation marks surrounding *ḥadīth*s, and the occasional full stops and colons are possibly editorial. Occasional stars and the letter ـــه *hā'* (standing for انتهى *intahā*, it has ended), which are devices often found in Mss. to mark the end of a quotation or a section, may well however be original.

Apart from a few somewhat puzzling passages, al-Shawkānī's text is lucid and his material and arguments are logically presented and clearly explained, making the work considerably more approachable than *al-Baḥr al-Zakhkhār* of Ibn al-Murtaḍā. In the course of his

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[35] *Qāḍī al-Quḍāh wa-Ra'īs al-Quḍāh*.

[36] Al-'Amrī (1992d: 828b) in *al-Mawsū'ah al-Yamanīyah* gives the year of his death as 1250/1834. Brockelmann (1937-49: Supplement II, 818) also gives the Hijrī year as 1250 (though this has been incorrectly converted to AD 1832). The title page of the 1973 Beirut edition of *Nayl al-Awṭār* however gives the Hijrī year of his death as 1255 (which would be AD 1839-40).

[37] Brockelmann 1937-49: Supplement, II, 818-19.

[38] Al-'Amrī 1992d: 829a.

[39] Al-Shawkānī, Muḥammad bn 'Alī bn Muḥammad, *Nayl al-Awṭār min Aḥādīth Sayyid al-Akhyār*, (6 vols.) 1973, Dār al-Jīl, Beirut. Brockelmann (1937-49: Supplement, II, 818-19) gives a slightly modified title for the 1297 (1878) Būlāq edition: *Nayl al-Awṭār min Asrār [fī sharḥ] Muntaqat al-Akhbār*.

[40] In this sharecropping chapter there is as far as can be seen only one error (المشمتلة for which should be read المشتملة *al-mushtamilah* on p. 13 of the published text).

discussion on sharecropping al-Shawkānī mentions by name some seventy persons. Most of these are readily identifiable as *Aṣḥāb* (Companions of the Prophet), *Tābi'ūn* (their Successors), the early collectors of *ḥadīth*s (especially al-Bukhārī, Muslim and Abū Dāwūd), and the founders and early adherents of all four Sunnī legal Schools. In addition, he cites at one point the views of the less well-known Ẓāhirī School. Al-Shawkānī refers also to five works in his sharecropping chapter. Of these, *al-Qāmūs* and *al-Umm* are easily identifiable as al-Fīrūzābādī's lexicon *al-Qāmūs al-Muḥīṭ* and al-Shāfi'ī's *Kitāb al-Umm* respectively. A third, *al-Muṣannaf*, is likely to be the famous work by the traditionist Abū Bakr 'Abd al-Razzāq bn Hammām al-Ṣan'ānī (126-211/744-827),[41] the teacher of Aḥmad bn Ḥanbal, since al-Shawkānī elsewhere cites 'Abd al-Razzāq by name. The other two (*al-Iqlīd* and *al-Fatḥ*) have not been identified.

As if to show his Zaydī credentials, al-Shawkānī always inserts وآله *wa-āli-hi* (and his family) in the honorific formula following a mention of the Prophet used particularly (though not exclusively) by the Zaydīs and other Shī'ah sects: صلى الله عليه وآله و سلّم *ṣalla Allāhu 'alay-hi wa-āli-hi wa-sallam* (May God bless him and his family and grant him salvation). Despite this, he, like Ibn al-Murtaḍā, draws extensively on the views of the four Sunnī schools of law (even though he does not always agree with them), and both of these Zaydī authorities could be seen perhaps as specific validations of N.J. Coulson's assertion that Zaydī law is "a fusion of Sunnite and Shī'ite principles".[42] More than this, though, even to regard al-Shawkānī as a Zaydī may be misleading, since, as Brockelmann has declared, he did not restrict himself to any acknowledged *madhhab*,[43] and it is certainly notable that, in at least the *Kitāb al-Musāqāh wa-al-Muzāra'ah* of the *Nayl al-Awṭār*, al-Shawkānī does not cite a single Zaydī imām. While this omission may be because he is sure his readership will already be well-versed in the writings of previous Zaydī authorities, it should be noted that such an assumption was not made by Ibn al-Murtaḍā, who, as been seen above (in Section 5.23), quotes the views of previous Zaydī imāms extensively throughout.

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[41] See al-'Amrī 1992e: II, 633.

[42] Coulson 1964: 119.

[43] Brockelmann 1937-49: Supplement, II, 818. Al-Shawkānī's intellectual "emancipation" from sectarian restraints, especially regarding his poetry, is the subject on an article by Muḥammad Muṣṭafā Balḥajj (1990). See also al-Ahdal (1990) and Rafīdah (1990).

Al-Shawkānī's *Kītāb al-Musāqāh wa-al-Muzāra'ah* in the *Nayl al-Awṭār* falls broadly into two sections. In the first (pp. 7-11) his concern is to show that in his opinion the sharecropping contracts of both *muzāra'ah* and *musāqāh* are legally valid. In support of this view he quotes several *ḥadīth*s and the opinions of many eminent jurists from the different legal schools. His second and longer section (pp. 11-18) deals with situations in which such contracts can be legally invalid, and here again he underpins his argument with the relevant *ḥadīth*s and cites the views of other jurists. The circumstance of invalidity of a contract with which he is principally concerned is when a landowner stipulates that his share of the harvest is to be cropped from a specific plot of ground and particularly where that plot is close to irrigation channels and is therefore better watered.

Although much longer than the section devoted to sharecropping by Ibn al-Murtaḍā, al-Shawkānī's treatment of the subject can be summarised rather more succinctly.

5.32 A Synopsis of the Kitāb al-Musāqāh wa-al-Muzāra'ah *with Comments*

As is common in such *fiqh* works as *Nayl al-Awṭār*, al-Shawkānī opens this chapter on sharecropping with the recitation of the *ḥadīth*s relevant to the subject. Here, as throughout the work, his sources of *ḥadīth*s are not only the two most highly regarded collections—the *Ṣaḥīḥān* of al-Bukhārī (d. 256/870) and Muslim (d. 261/875)—but also the four other well-known "canonical" collections of Abū Dāwūd (d. 275/889), al-Nasā'ī (d. 303/915), Ibn Ḥanbal (d. 241/855) and Ibn Mājah (d. 273/887).

The first two *ḥadīth*s al-Shawkānī cites originate from 'Abdallāh bn 'Umar, the son of the second caliph, and concern the Prophet's dealings with the Jews of Khaybar. The substance of these *ḥadīth*s has already been discussed in Chapter 3 (Section 3.32), and as was seen there the deal that the Prophet granted the Khaybar Jews was that they could continue to work the land in return for handing over half of the dates and grain they harvested. Al-Shawkānī then quotes the introductory remarks to these Khaybar *ḥadīth*s made by al-Bukhārī, Muslim, Abū Dāwūd and al-Nasā'ī, before drawing a conclusion of his own: that the *ḥadīth*s indicate that the seed-corn would be provided by those working the land (that is, the Jews) and that the shares of the two parties to the arrangement would be equal.

The next two *ḥadīth*s quoted by al-Shawkānī which originate respectively from 'Umar, the second caliph, and 'Abdallāh bn 'Abbās, a cousin of the Prophet, also concern the deal with the Jews at Khaybar.

Al-Shawkānī's fifth *ḥadīth*, from Abū Hurayrah, a Companion well-known for the large number of *ḥadīth*s he narrated, deals with the event at Medina when the resident *Anṣar* allowed the *Muhājirūn* newly arrived from Mecca to work the land in return for a share of the harvest, while the sixth *ḥadīth* is the narration from Ṭāwūs that a certain Companion called Ma'ādh bn Jabal leased land in return for a third or a quarter of the harvest during the Prophet's lifetime and continued to do so throughout the caliphates of the first three *Rāshidūn* Caliphs Abū Bakr, 'Umar and 'Uthmān, spanning the years 11/632 to 35/656. Al-Shawkānī follows this with a further narration from al-Bukhārī which states that several well-known and eminent *Muhājirūn*, including 'Alī and his family, and 'Abdallāh bn Mas'ūd, 'Umar bn 'Abd al-'Azīz and the family of Abū Bakr, all made sharecropping contracts in exchange for a half or a quarter of the harvest. Al-Shawkānī then comments on the reliability of the *isnād*s (chains of narrators) of these *ḥadīth*s. The only error he notes is in the *ḥadīth* which concerns Ma'adh bn Jabal since the latter had already died during the caliphate of 'Umar and that Ṭāwūs could not therefore have heard the narration from Ma'ādh.

In presenting these well-known *ḥadīth*s al-Shawkānī's intention is quite clear. He is establishing, first, that the Prophet himself made a sharecropping contract, and second, that eminent Muslims practised the system with the tacit approval of the Prophet and continued the practice for at least twenty years after his death. These are points which al-Shawkānī takes up later as evidence that sharecropping contracts are valid.

Al-Shawkānī then briefly discusses the nature of the *musāqāh* contract. According to him, the majority view is that it is a sharecropping contract on land growing date-palms, grape-vines, and any other trees which bear fruit, though others have restricted its application. He says:

> The *musāqāh* is [a contract] in date-palms, grape-vines and all fruiting trees in which a known part of the fruit goes to the *ajīr* (tenant); this

> opinion is held by everyone. In his later writings[44] al-Shāfi'ī applied [the term] only to date-palms and grape-vines. Dāwūd[45] restricted it to date-palms. Mālik said [the contract] is valid in sown crops and trees but is invalid in vegetables according to most authorities, but it has been narrated from Ibn Dīnār that he [Mālik] considered it valid [even] in [vegetables].[46]

Al-Shawkānī now embarks on a short discussion of the etymology of the terms *muzāra'ah* and *mukhābarah*. *Muzāra'ah* is easily disposed of since the root at least is clear (*z-r-'*, sowing). *Mukhābarah* is more of a problem since, he says, different authorities have different views of its provenance. He himself, it would appear, prefers the derivation of the term from *khabīr*, meaning farmer, but he quotes three other possibilities favoured by other authorities: *khabār* (soft land), *khubr* (a portion or share), and Khaybar.

Al-Shawkānī's next concern is to give the Shāfi'ī view of the practice, and in so doing he quotes directly from the *Kitāb al-Umm*. Al-Shawkānī's words read as follows:

> The Shāfi'īs have explained *mukhābarah* by saying that it is working on the land in return for part of what is produced from it, the seed-corn being supplied by the labourer. Some people have held that the terms *musāqāh*, *muzāra'ah* and *mukhābarah* all have the same meaning. Al-Shāfi'ī himself stated this. In the *[Kitāb] al-Umm* under the chapter on the *muzāra'ah* he says:
>
> > "If a man hands over [a plot of] *arḍ bayḍā'* (land on which there are no perennial crops) to another man on the basis that the latter cultivates it and one part of anything which is produced from [the land] belongs to him, then this is the *muḥāqalah*, *mukhābarah* and *muzāra'ah* which the Messenger of God (may peace be upon him and his family) prohibited."
>
> Al-Bukhārī made a similar statement, he being of the [same] viewpoint as the Shāfi'īs.[47]

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[44] The Arabic reads here: وفي قوله الجديد *wa-fī qawli-hi al-jadīd*. Cf. al-Nawawī's use of *al-qadīm* (in *Nayl al-Awṭār*: II, 143_{2-3}) to refer to al-Shāfi'ī's earlier writings (Chapter 4, Section 4.32).

[45] The Dāwūd meant here is probably Dāwūd bn Khalaf (d. 270/883), the founder imām of the (now extinct) Ẓāhirī School which was characterised by its literalist approach to interpreting the Qur'ān and the *ḥadīths*, since al-Shawkānī later quotes a view of that *madhhab* (p.913 in the cited published edition).

[46] Al-Shawkānī *Nayl al-Awṭār*: V, 8_{15-19}.

[47] Al-Shawkānī *Nayl al-Awṭār*: V, 8_{26}-9_6. Al-Shawkānī's quotation from al-Shāfi'ī is to be found in the *Kitāb al-Umm*: VII, 101.

Al-Shawkānī follows this with a quotation from al-Fīrūzābādī's *al-Qāmūs al-Muḥīṭ* which defines the *muzāra'ah* in substantially the same terms as the definition by al-Shāfi'ī, though al-Fīrūzābādī's definition of *mukhābarah* makes by no means any clear distinction. Al-Shawkānī's words in translation are:

> [Al-Fīrūzābādī, the author of] the *Qāmūs*, says:
> "The *muzāra'ah* is the mutual deal on land for part of what is produced from it, the seed-corn being supplied by the landowner", and:
> "The *mukhābarah* is when he sows on the basis of half or a similar proportion".[48]

Al-Shawkānī now considers the question of time limits to sharecropping contracts, and specifically whether or not the agreement made between the Prophet and the Jews of Khaybar had a fixed time period. He notes that some (unnamed) authorities hold the view that there should be a time limit, quoting in support of this view a *ḥadīth* about the Prophet's order for the Jews' final expulsion from Arabia. He also mentions the opposing view, however, and it is not clear from the text which opinion he himself adheres to on this matter.

He then gives the details of the authorities from whom the *ḥadīth* about the deal struck between the *Anṣār* and the *Muhājirūn* in Medina originated.

On the way he observes that there exist other *ḥadīth*s which mention sharecropping contracts but that al-Bukhārī includes them not in his chapter on sharecropping but rather under the subject of *salaf*, a type of transaction involving advance payment for goods which will be delivered at a later date. Al-Shawkānī deduces that al-Bukhārī did this to show that there is no difference of opinion among the authorities about the legality of sharecropping. The point is that these other *ḥadīth*s which al-Bukhārī categorises as dealing with *salaf* would seem ostensibly to prohibit sharecropping contracts outright. Al-Shawkānī does not mention this here though he takes up later the question of conflicting evidence from the *ḥadīth*s.[49]

Al-Shawkānī then summarises the validity of *muzāra'ah* and *musāqāh* contracts according to the authorities who support the view that these contracts are legal, including several Companions of the Prophet and

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[48] Al-Shawkānī *Nayl al-Awṭār*: V, 9_{6-7}. The quotations he makes are to be found in al-Fīrūzābādī *al-Qāmūs al-Muḥīṭ*: II, 447b and 6b.

[49] In an earlier chapter of *Nayl al-Awṭār* (V, 278 ff.) al-Shawkānī himself discusses the *ḥadīth*s dealing with *salaf* recorded by al-Bukhārī and the other Traditionists.

jurists including the Ḥanafīs Abū Yūsuf (d. 182/798) and Muḥammad bn al-Ḥasan al-Shaybānī (d. 189/804). Al-Shawkānī's summary is, in essence, that both contracts are valid whether as free-standing contracts the one involving sown crops and the other irrigation of perennial crops, or as a combined contract involving both types of crop. Although al-Shawkānī does not mention the fact, the significance of this can be understood when it is remembered that the developed Shāfi'ī doctrine allows *muzāra'ah* only if it is an integral part of a *musāqāh* contract, as was discussed in Chapter 4 (Section 4.3 above) when al-Nawawī's view was being considered. That is to say, al-Shawkānī is arguing here that the Shāfi'ī restriction on sharecropping with annually sown crops is not required.

It is at this point that al-Shawkānī introduces what is to become the main thrust of his argument against authorities who deny the validity of sharecropping. His thesis is that they have misinterpreted the nature of the prohibitions contained in the so-called prohibition *ḥadīth*s in either of two ways. First, these prohibitions in al-Shawkānī's view are of the *nahy al-tanzīh* category rather than *nahy al-taḥrīm*: that is to say, injunctions to avoid if possible certain actions, and not outright prohibitions. Second, the *ḥadīth*s which prohibit sharecropping apply only to cases where the shares of the crop for each of the parties come from different plots of land. A translation of al-Shawkānī's words is as follows.

> Concerning the *ḥadīth*s that prohibit the *muzāra'ah* [the authorities who uphold the legality of sharecropping] respond by saying that they relate to a *tanzīh* prohibition. Some say that they relate to cases where the landlord stipulates [that his share of the crop is to come from] a specific plot [of the land].[50]

Before discussing this further al-Shawkānī establishes that even those authorities who deny the legality of sharecropping as such accept that leasing land for a rent on which a cash value can be placed is permitted. He goes on to say that sharecropping however is different from ordinary leasing in that the cash value of the rent cannot be known at the time the contract is made, and that in the view of the authorities who reject sharecropping the Khaybar *ḥadīth*s cannot be used as evidence to support the practice since the Jews at Khaybar were conquered *'anwat*[an] (that is to say, by force, rather than by

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[50] Al-Shawkānī *Nayl al-Awṭār*: V, $10_{5\text{-}6}$.

treaty).[51] They therefore became slaves, so the argument goes, and could not therefore act as equal partners in a sharecropping contract.

Al-Shawkānī's discussion of this leads into the second section of the chapter. In it he is principally concerned with situations in which sharecropping contracts are indeed invalid and how the opponents of sharecropping have wrongly generalised such circumstances to all types of sharecropping. He begins by quoting five *ḥadīth*s at least three of which originate from the Companion Rāfi' bn Khadīj. These *ḥadīth*s has already been discussed in Chapter 3 (Section 3.33 above). Their gist is that during the Prophet's lifetime Muslims used to practise sharecropping in which the shares of the two parties would come from different parts of the land and that the Prophet prohibited this practice. In three of these *ḥadīth*s the plot which produced the landowner's share is stated specifically to be the part of the land alongside water-channels (which could be expected to be better irrgated). In the other two the narrator states that different plots would often produce differential yields (and would therefore also be unfair to one or other of the parties to the contract).

So that these five *ḥadīth*s may be fully understood by his readers al-Shawkānī then embarks on a detailed explanation of the key phrases in them. First, he explains the term *ḥaql*, which occurs in one of the *ḥadīth*s, by quoting from al-Fīrūzābādī's *al-Qāmūs al-Muḥīṭ*. Al-Fīrūzābādī gives four meanings, one of which is *muzāra'ah* and the other three are transactions involving *gharar* (risk).

Al-Shawkānī then argues that what the Prophet had prohibited here is not sharecropping itself but a form of sharecropping in which the shares of the parties come from different plots of land, a practice which leads to *gharar*. *Gharar* must of course be strenuously avoided since, as al-Shawkānī later states, it "leads to disputes and to a futile waste of people's resources".[52]

The next point which al-Shawkānī sets out to explain is subsidiary to the main thrust of his argument. It concerns whether the narrator Rāfi' bn Khadīj (whose sharecropping *ḥadīth*s were examined in

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[51] *'Anwat*an, by force, as opposed to *ṣulḥ*an, by treaty. In theory, the way in which lands were conquered by the Muslim decided the manner by which they were to be dealt with from the points of view of ownership, taxation and so on, though as D.C. Dennett (1950), F. Løkkegaard (1950: esp. 45ff.) and others have shown the theory did not always apply in practice.

[52] Al-Shawkānī *Nayl al-Awṭār*: V, 12_{25-26}. The Arabic here reads:

الغرر المؤدي إلى التشاجر وأكل أموال الناس بالباطل *al-gharar al-mu'addī ilā al-tashājur wa-akl amwāl al-nās bi-al-bāṭil.*

Chapter 3, Section 3.33 above) had correctly reported in this context that leasing land for cash was permitted or whether he had interpolated this from another frame of reference. The question of leasing land for cash is a subject that al-Shawkānī returns to later.

Among the significant phrases in the *ḥadīth*s which al-Shawkānī quotes are three terms meaning the banks of water-channels (المذانيات *al-mādhiyānāt*, أقبال الجداول *aqbāl al-jadāwil* and الأرباع *al-arbi'ā'*). After clarifying these he restates at greater length his argument against those who claim the *ḥadīth*s prohibit sharecropping: what has been prohibited, he says, is not sharecropping itself but rather sharecropping contracts which include stipulations that the crop is to be divided according to where it grows on the land or to other conditions which can lead to *gharar*. To support his argument further he notes again the fact that both the Prophet and the Companions practised such dealings and he quotes from another *ḥadīth* related by Rāfi' bn Khadīj which relays the words of the Prophet:

> "Whoever has land, let him cultivate it himself or let him get someone else to cultivate it for him, and the two parties should not find it reprehensible to practise this arrangement in return for a third or a quarter of the crop nor for stated foodstuffs."[53]

Turning now to narrations which relate that the Prophet seemingly prohibited sharecropping al-Shawkānī quotes two *ḥadīth*s from the collection of the Traditionist Abū Dāwūd, one of which contains the Prophet's rebuke to a sharecropper: "*Arbaytum*" (You have practised *ribā* (unjustified profit)). But al-Shawkānī argues that such *ḥadīth*s cannot invalidate the many authoritative *ḥadīth*s which indicate that the Prophet did institute sharecropping at Khaybar, that the Companions continued the practice after his death, and that therefore the practice in itself cannot be *ribā*. Nor can the *ḥadīth*s which permit sharecropping be taken as specifically valid only for the Prophet and not valid for any of his followers since his most eminent Companions continued to practice it. If it had been forbidden, al-Shawkānī says, it would be extremely unlikely that the Companions would be unaware of the fact.

Al-Shawkānī then moves on to quote three further *ḥadīth*s, this time from the Companion Asīd bn Ẓuhayr but again involving Rāfi' bn Khadīj. The sharecropping system in question here involved not only

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[53] *Ḥadīth* quoted by al-Shawkānī *Nayl al-Awṭār*: V, 13_{13-14}.

a share for the landlord from the part of the land irrigated by water-channels as in the previous *ḥadīth*s, but also in addition the *quṣārah* (the grain which is not expelled from the husk after the first threshing). After stating this, Asīd is then told by Rāfi' that this practice was forbidden by the Prophet. Al-Shawkānī notes that this full version of the *ḥadīth* is found in the collections of Ibn Ḥanbal and Ibn Mājah, but also that two other collections—those of Abū Dāwūd and al-Nasā'ī—significantly omit the beginning of the narration in which Asīd describes the kind of sharecropping involved. After a brief aside in which al-Shawkānī explains the meaning of *quṣārah* and that *ḥaql* here means land fit to be cultivated (i.e., "field" rather than "sharecropping"), he cites a further *ḥadīth*, again from Rāfi', in which the share of the landlord is a quarter of the harvest and in addition some absolute measures of fruit and barley, and he notes that the Prophet forbade this.

As al-Shawkānī perceptively observes, the first part of Asīd's words are crucial to understanding the true nature of the prohibition. That is to say, sharecropping is not itself forbidden, but rather sharecropping which involves extra stipulations which favour unequally one of the parties, and especially the landlord.

This is followed by two further *ḥadīth*s and al-Shawkānī's comments on them. Both relate substantially the same kind of situations as that narrated by Asīd bn Ẓuhayr. The first of these originates from Jābir and the second from Sa'd bn Abī Waqqāṣ. Al-Shawkānī concludes as before that the Prophet's prohibition as narrated in the *ḥadīth* must refer to the extra stipulations by which the landlord profited unduly, either by having his share of the harvest come from a favoured part of the land, or else by having extra produce added to his share, or by both.

The remainder of what al-Shawkānī has to say in this chapter is largely a reiteration of this argument. He quotes several more *ḥadīth*s in support of his interpretation, analysing after each narration the critical phrases and drawing parallels with the *ḥadīth*s he has already quoted. A subsidiary argument, emerging from certain of the *ḥadīth*s, concerns the permissibility or otherwise of allowing land to lie fallow if neither the owner nor a tenant can cultivate it. Al-Shawkānī points out that certain (unnamed) authorities disapprove of leaving land uncultivated because to waste assets is prohibited and merit is attached to sowing and planting, though he himself finds this reasoning unconvincing. As he rightly indicates, land even if it is not under cultivation can be beneficially used to produce timber and as pasturage for

livestock, and leaving it fallow, he adds, might well improve its fertility so that one lost harvest would be made up for in subsequent years.

Al-Shawkānī then comes to his conclusion. If a landowner wishes he may cultivate his land himself or lend it gratis to someone else to cultivate for him or leave it fallow, though he is compelled to do none of these. He then adds a fourth option which is allowed by the consensus of jurists, namely, to lease the land, and the implication is that the lease can be of the sharecropping type.

5.33 Discussion

Although he touches on other aspects of sharecropping along the way, such as the etymology of the terms *muzāraʿah* and *mukhābarah*, and the explanation of certain uncommon terms in the *ḥadīth*s meaning water-channels, it is clear that the dominant concern of al-Shawkānī in the *Kitāb al-Musāqāh wa-al-Muzāraʿah* of his *Nayl al-Awṭār* is to prove the legitimacy of sharecropping contracts in Islam. There are two thrusts to his argument and both are founded on a detailed examination of the relevant *ḥadīth*s.

His first thrust relies on the fact that there are many authoritative *ḥadīth*s which relate that not only the Prophet himself but also a number of the Companions and the Successors engaged in sharecropping. His second thrust is that the *ḥadīth*s which ostensibly prohibit sharecropping can be shown in fact not to prohibit it absolutely. Either they forbid it only in certain cases, notably where supplementary conditions are attached to a contract which benefit one party unfairly, such as the stipulation that the landowner's share should come from the land alongside the water-channels, or else they are of the nature of *tanzīh* injunctions (that is, injunctions to avoid certain actions if it is possible to do so) and not absolute prohibitions of the *nahy al-taḥrīm* kind.

The lines of his argument then are clear enough. What is perhaps not so clear is why al-Shawkānī should have devoted his evidently considerable intellect to showing at such length and in such detail why all three forms of sharecropping should be considered valid. During al-Shawkānī's lifetime sharecropping in the Yemen is likely to have been as commonplace and as acceptable a means of leasing land as it will be shown to be, in Chapter 6 below, in the present-day Yemen, and as it no doubt was four centuries before at the time of Ibn al-Murtaḍā. Yet neither the authors of the modern Yemeni Civil Code *al-Qānūn al-Madanī* nor the ninth/fifteenth century Ibn

al-Murtaḍā make any more than a passing reference to the *ḥadīth*s by which sharecropping in its three main forms can be justified before they move on to the detailed practical regulations. For al-Shawkānī, on the other hand, to justify sharecropping was his central purpose, to the complete exclusion of any discussion on how it should be regulated in practice.

5.4 Concluding Remarks on the Zaydī Position

Like his Zaydī predecessor Ibn al-Murtaḍā, al-Shawkānī accepts all three main forms of sharecropping as legally valid in principle, given certain basic qualifications. This marks both authorities off from the Shāfi'īs who, as has been seen, accept only *musāqāh* and a very limited form of *muzāra'ah*. Indeed, the Zaydī stance would seem very much more relaxed, and could perhaps be called more pragmatic, about sharecropping than that of many Sunnī authorities. This was true too of the sharecropping Articles of the Yemeni Civil Code *al-Qānūn al-Madanī* which was discussed in Chapter 3 (Section 3.5 above) and which might therefore be seen as encapsulating the Zaydī view rather more than the Shāfi'ī view. How far the Zaydī School can be viewed, as N.J. Coulson has asserted, as "a fusion of Sunnite and Shī'ite principles" cannot of course be decided on the short and specific passages under study in this chapter. However, it is surely notable that both Ibn al-Murtaḍā and al-Shawkānī do indeed draw extensively on the views of the four Sunnī schools of law, including the Shāfi'īs, even though not always agreeing with them.

To that extent therefore Ibn al-Murtaḍā and al-Shawkānī are similar, despite the four hundred years that separates them. However, al-Shawkānī's approach to the subject is very different from that of Ibn al-Murtaḍā, as has been mentioned at the end of the previous Section (5.33 above), and the reason is that their intentions are different. In fact, in the passages of these two authorities which have been examined in this chapter we are dealing with different kinds of *fiqh* text. Ibn al-Murtaḍā is concerned with putting forward in a detailed though abbreviated form to the Zaydī *'ulamā'* of his day the practical regulations affecting the different types of sharecropping, such as what the duties of the tenant are, or what happens if the landowner dies during the term of the contract, and he spends hardly any time arguing the legal theory of the validity of the practice. For him, its validity is axiomatic and the briefest of mentions of support-

ing *ḥadīth*s is all that is required. With al-Shawkānī the position is reversed. He presents detailed arguments for and against different kinds of sharecropping contract, all founded on a close examination of the *ḥadīth*s, but he does not concern himself with the day-to-day regulations of how sharecropping contracts should be arranged and governed in practice. Further, given this, it is by no means surprising that al-Shawkānī makes no mention of custom (neither *'urf* nor *'ādah*) at any point, whereas Ibn al-Murtaḍā specifically appeals to custom when he is discussing the conditions of labour and the duties of the tenant.

In a sense therefore Ibn al-Murtaḍā's work, despite its linguistic and stylistic difficulties, is much more of a practical guide or handbook to sharecropping than that of al-Shawkānī. It is to sharecropping as it is practically organised in the Yemen today that the focus now turns below in Chapters 6, 7 and 8, which constitute Part II.

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PART II

YEMENI SHARECROPPING IN PRACTICE

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CHAPTER SIX

THE CURRENT YEMENI SITUATION AND ARRANGEMENTS

6.1 Introductory Remarks

The theoretical issues involved in sharecropping in Islam have been examined in Part I of this book. This chapter, Chapter 6, together with much of the rest of Part II, is concerned with sharecropping in the Yemen as it manifests itself in practice. The source of the information on which this chapter is based is mainly fieldwork the present writer conducted in the Yemen in 1992 and 1993 and the methodology and coverage of which are explained at the end of the book. In brief, wide-ranging interviews were conducted with sharecroppers, landowners, *qāḍī*s (judges), officials of the Yemeni Ministry of Agriculture, and others with specialist knowledge at some 24 locations in northern Yemen. Table 6.1 shows these locations and the regions into which they have been classified. The criteria on which the classification into regions is based are climate, topography and dominant sources of water. Figure 6.1 maps the locations of the interviews in relation to these regions.

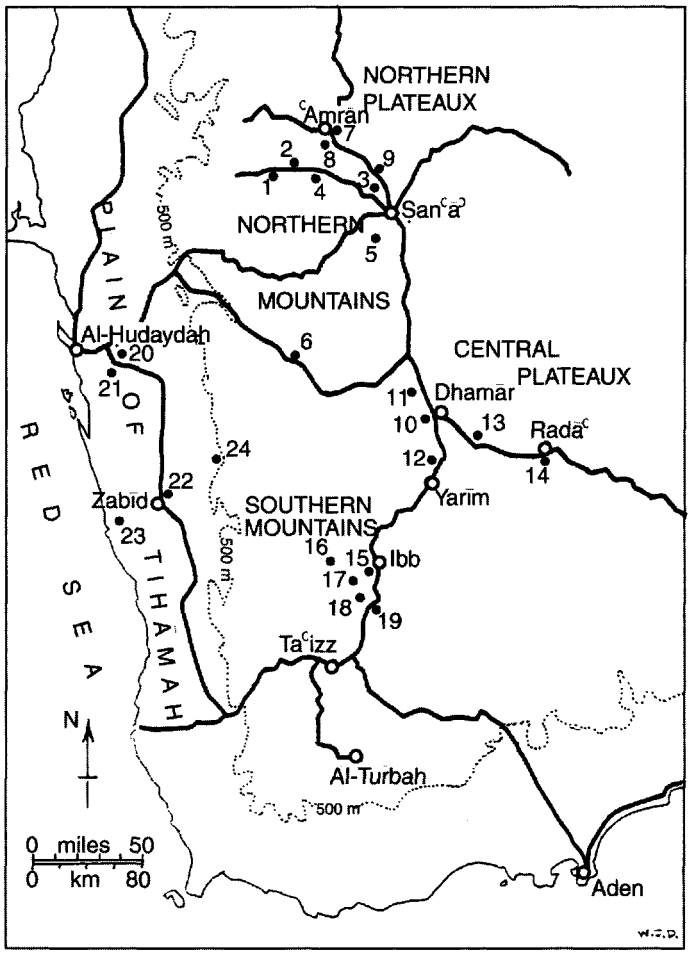
The field survey has been supported by and contrasted with information derived from the published material of other field researchers where such is available and comparable.

The chapter begins, in Section 6.2, with a discussion of the land tenancy and sharecropping terminology as it is currently used in the northern part of the country. Appendix 1 includes all the known terms for sharecropping. Section 6.3 then shows the dominance of sharecropping in land tenancy in the northern Yemen and Section 6.4 analyses the many different systems of crop-sharing found there.

Table 6.1. The sample locations of the present field survey

Region:	Location:	No. of interviews
Northern Mountains		
Characteristics: cool climate on upper slopes, warm in valleys; *ghayl* irrigation and rain-fed agriculture, with wells in piedmont areas		
	al-Ṭāwīlah	1
	al-Ahjur	3
	Qābil Wādī Ẓahr	2
	Shibām	4
	Sanā' (SW of Ṣan'ā')	1
	Madīnat al-Shirq	2
	Regional total:	13
Northern Plateaux		
Characteristics: cool climate; rain-fed agriculture and pump wells		
	'Amrān	2
	Najr	3
	al-Ḥāwirī	1
	Hamdān	1
	Regional total:	7
Central Plateaux		
Characteristics: cool climate; rain-fed agriculture and pump wells		
	Dhamār	1
	Afq	2
	al-Mayfa'ah	5
	Ribāṭ 'Imrān	3
	al-Kahaylah (south of Radā')	3
	Regional total:	14
Southern Mountains		
Characteristics: warm to hot climate with high rainfall; *ghayl* irrigation and rain-fed agriculture		
	Ibb	2
	al-'Udayn	4
	al-Waqash (above Jiblah)	4
	Dhī al-Sufāl	4
	al-Qā'idah	2
	Regional total:	16
Central Tihāmah		
Characteristics: hot; humid near coast; pump well irrigation, with *sayl* irrigation especially important towards and within the piedmont zone		
	al-Kimbāḥiyah (in al-Abyāt area)	4
	al-Mukaymanīyah (in al-Za'farān area)	2
	Zabīd (Agricultural Research Station)	1
	al-Suwayq	5
	Mishrāfah	4
	Regional total:	16
	Total, all regions:	66

Figure 6.1. The sample locations of the present field survey



Key to Sample Locations:

1	al-Ṭawīlah	9	al-Ḥāwirī & Hamdān	17	al-Waqash
2	al-Ahjur	10	Dhamār	18	Dhī al-Sufāl
3	Qābil Wādī Ẓahr	11	Afq	19	al-Qāʿidah
4	Shibām	12	Ribāt ʿImrān	20	al-Kimbāḥiyah
5	Sanāʿ	13	al-Mayfaʿah	21	al-Mukaymanīyah
6	Madīnat al-Shirq	14	al-Kahaylah	22	Zabīd
7	ʿAmrān	15	Ibb	23	al-Suwayq
8	Najr	16	al-ʿUdayn	24	Mishrāfah

6.2 THE YEMENI TERMINOLOGY OF SHARECROPPING AND RELATED MATTERS

6.21 Sharecropping Land

The terms designating a sharecropping contract found in literary sources which were discussed in Chapter 2 (Section 2.3) (primarily *muzāra'ah*, *mughārasah* and *musāqāh*) were discovered during the field surveys specifically not to exist in the modern, colloquial terminology of any of the areas visited. Corresponding terms for the tenant, such as *ghāris* or *musāqī*, were similarly never encountered in the field. Instead, the sharecropping contract and the sharecropping system were spoken of most usually as *sharākah*, sometimes *shirk*, and often as simply *ijārah* (leasing, renting). The sharecropping tenant is correspondingly either a *sharīk*, or else an *ajīr* or a *musta'jir*. The landowner is usually *mālik al-arḍ*, or simply *al-mālik*, or else *rabb al-arḍ* or *ṣāḥib al-arḍ*. Sometimes when he is being contrasted with *ajīr* or *musta'jir* (lit. lessee), he is called the *mu'ajjir* (lit. lessor), while *mālik* often becomes *malīk* when coupled with the term *sharīk* (*al-sharīk wa-al-malīk*, the sharecropper and the landowner).[1]

The widespread use in the Yemen at the present day of terms from both the root أجر *'-j-r* and the root شرك *sh-r-k* in the context of sharecropping is interesting. As was pointed out in Chapter 2 (Section 2.3), most of the Schools of Islamic law regard sharecropping as a special form of *ijārah* (even though such a view can lead to the problem of *gharar* (risk) since the rent cannot be specified in absolute terms at the time the contract is made), though there is also the alternative view that the contract is rather a type of *sharikah*, a partnership on the analogy of the *muḍārabah* commercial partnership. The distinction between the two roots is not however reflected in practical usage today. In the field it was noted that the terms *sharīk* and *musta'jir*, for example, are used interchangeably to mean sharecropper both by the farmers themselves and by *qāḍīs*, agricultural extension officers and others knowledgeable about farming. It would seem therefore that insofar as the matter is consciously considered by present-day

[1] The term *ṭabīn*, recorded for the landowner in Ḥaḍramawt by R.B. Serjeant in the context of date-palm cultivation and found on pre-Islamic inscriptions (Serjeant 1955a: 11; 1981a: 308; and 1988: 149-50), seems not to be commonly known as a term for landowner in North Yemen, even in the areas of Tihāmah where date palms are important.

Yemenis (which may well be not very much) the dual attitude to sharecropping of the Islamic Schools of law is reflected in the modern terminology.

At one settlement in the present survey the terms *sharākah* and *sharīk* were found not to be used for sharecropping and sharecropper. The settlement was Mishrāfah, located just upstream of the point where the Wādī Rima' debouches onto the plain of Tihāmah and where the crop (on the flood plain of the *wādī*) is predominantly bananas. Here the term for what is essentially a sharecropping system is *sharāḥah* (or perhaps *shirāḥah*) and the sharecropper is a *sharīḥ* or a *shāriḥ* (pl. *shurrāḥ*). These terms were not heard in any other area visited and they may be restricted to the Tihāmah piedmont area or else to areas where bananas are the chief produce. Unfortunately, Mishrāfah was the only settlement visited where the terms were found and moreover the only place where bananas were the dominant crop, and the terms may well be more widely used in northern Yemen than the field information indicates. Certainly the same terms, in the forms *shirāḥah* and *shāriḥ* (pl. *sharaḥ* and *shurrāḥ*), have been recorded by R.B. Serjeant in Ḥaḍramawt as meaning respectively palm-protection and the one who protects the palms and other crops from the depredations of birds and raiders (though presumably not necessarily in the context of sharecropping).[2]

The distinction between owner-farmed land and sharecropped land is made in local terminology often by the use of the pair of terms *malākī* for the former and *sharākī* for the latter. In place of *sharākī* the term *arāḍī mushrakah* was also recorded in the field survey.

As has been said above, *ijārah* and other derivatives from the same root are used as much in the context of sharecropping as that of fixed rent tenancies. If a distinction has to be made, the usual term used to differentiate a fixed rent tenancy from a crop-sharing agreement is *qaṭ'* (literally, cut, and presumably implying clear-cut and hence fixed), and the fixed rent tenant is a *qaṭī'*. The fixed rent itself is described as *shay' ma'lūm* or *shay' ma'rūf* (something known or fixed [beforehand]). This implies that a rental under a sharecropping system is recognised and accepted as *ghayr ma'lūm* (not known) beforehand.

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[2] Serjeant 1981a: 307 ff; cf. Landberg 1920-42: III, 2036, root *sh-r-ḥ*: "*Shāriḥ* pl. *shurrāḥ*, gardien des champs, lorsque le blé est déjà grand, ou gardien de bestiaux en général". The protective element in the duties of a sharecropper in northern Yemen will be referred to below in Chapter 8.

6.22 Some Other Agricultural Terms

A common term among Yemeni farmers for landholdings in a general sense is *iqṭāʿīyāt* (rather than *iqṭāʿāt*) and landowners are sometimes referred to especially by tenants as *iqṭāʿīyīn*.[3] More often a landowner is called, as in the literary works, *mālik al-arḍ*, or simply *al-mālik*, or sometimes *rabb al-arḍ*, and *ṣāḥib al-arḍ* is also frequently heard, as already mentioned above.

When a distinction has to be made in local terminology between land owned by private individuals and land held by a *waqf* (a religious endowment, pl. *awqāf*) or by the government, private land is often called *ḥurr* ("free" land), as opposed to *arḍ mawqūfah* or *arāḍī al-awqāf* (*waqf* land) and *ṣawāfī* or the singular *ṣāfiyah* (government land).

The features of the different irrigation systems of *ghayl* (pl. *ghuyūl*) and *sayl* (pl. *suyūl*) have already been outlined above in Chapter 1 (Section 1.22). Generally speaking, *ghayl* irrigation is from permanently flowing underground springs, whereas *sayl* irrigation depends on occasional spate flow of *wādīs*. There are however some instances where these terms are either replaced by or used instead of other terms, and to an outsider this can be confusing. On the plain of Tihāmah (and possibly elsewhere) land watered by *sayl* is called simply *wādī*, *wādī* in this context meaning the land watered by the spate flow of a *wādī*. In the mountain valleys *sayl* can often mean a permanent or quasi-permanent water flow, rather than an occasional spate flow, and so would be closer to the meaning of *ghayl*. On the high plateaux in areas where there are no true *ghayl*s, the term *ghayl* is often used to mean the water channelled from wells.

Land relying solely on rainfall is often termed *ʿaqar* (for *ʿaqr*, barrenness) in at least all the mountain and plateau locations which were visited.[4]

A final point to note here is that the plural of *bīr* (for *biʾr*, well) is

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[3] Both these terms *iqṭāʿīyāt* and *iqṭāʿīyīn* may be a modern reflection of the *iqṭāʿ* system of land apportionment under ʿUmar and his successor caliphs in the early centuries of the Islamic empire (Løkkegaard 1950: 14-20), though to what extent historical continuity could be proved in the case of the Yemen lies beyond the present discussion. See also al-Sharjabī (1990: 92).

[4] The effect on rain-fed land of the drought which spanned most of the 1980s was sometimes referred to as *al-taʿaqqur* and the land was said to have dried up (*taʿaqqarat al-arḍ*).

sometimes heard as *abyar* rather than the classical and more usual *ābār*.[5]

6.3 THE DOMINANCE OF SHARECROPPING IN THE YEMEN

6.31 Owner-Occupied Land versus *Tenanted Land*

It was found impossible in any of the sample areas to estimate even approximately how much of the land is *malākī* (owner-farmed), how much is tenanted for *shay' ma'lūm* (a fixed rent), and how much *sharākī* (sharecropped). There were three reasons for this.

First, to collect such data for even the sample areas of the present field study would have meant a substantial survey of a scope far greater than could be attempted by an individual researcher within a reasonable time frame.[6] Some official statistics and other studies do exist which purport to give the breakdown between owner-occupied land and leased land, but their results are difficult to compare with each other, largely because of different definitions of the categories used.[7]

Second, even reliable statistics would be reliable only for a very short time. In the 1990s in particular, the land tenure situation has been in a state of flux, especially perhaps in the capital area, as both landowners and tenants decide to move to Ṣan'ā' or towns elsewhere, or, after having built up sufficient capital through working in the towns, move eventually back home to agriculture. This population movement between country and town and *vice versa* seems to have been particularly marked since 1990, largely as a result of the combined effects of, first, the unification of North Yemen with the former PDRY in that year and the resultant free movement of

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[5] Extensive collections of other Yemeni agricultural terms, and especially those connected with irrigation, are to be found in Rossi 1953, Maktari 1971, Varisco 1982: 404-60, and in many of R.B. Serjeant's articles cited in the bilbliography to this book.

[6] Cf. M.W. Mundy (1981: 64), who found it impossible to estimate the proportion of land under sharecropping arrangements in her study area of Wādī Ẓahr (about 10 miles (16 km) to the north of Ṣan'ā').

[7] For example, a landowner may choose to work his land jointly in association with a tenant, so that the distinction between owner-occupied and tenanted is blurred. Again, it is never clear to what extent should be included land which is cropped perhaps only once in several years (and which will almost certainly have a different tenurial pattern associated with it as a result). Such relevant statistics as are available from other sources, including the UN study of Yemeni sharecropping (UN 1987), and the difficulties of interpreting them, will be enlarged on below.

"'Adanīs" northwards, and second, the Gulf War when in 1991 emigrant Yemenis working in the Gulf emirates and Saudi Arabia were forced to return home.[8]

Third, and most saliently, the distinction between landowners and tenants, whether those on a fixed rent basis or as sharecroppers, is not always as clear cut as might be imagined. Some tenants are also landowners and either add to the land they cultivate as their own by renting someone else's, or else are tenants in one area and owners in another. This was found particularly in the area around the capital Ṣan'ā' (for example, at al-Ḥājirī and in Wādī Ẓahr), and also more generally throughout all the areas visited. It is not surprising therefore that almost everyone who was approached for interview in the survey was involved in sharecropping in one way or another, either as landowner or as tenant, or sometimes as both.

6.32 The 1987 UN Report on Land Tenancy in North Yemen

There has been one study which gives some information on the proportion of farms which are owner-occupied as opposed to those which are sharecropped, albeit for only a few sample areas. The study of sharecropping and tenancy in the northern part of the Yemen (then the Yemen Arab Republic) carried out by a specialist team from the United Nations Joint Economic and Social Commission for Western Asia and the Food and Agriculture Organisation in the mid 1980s provides such tenancy information for 263 farms spread between eighteen sample districts in Tihāmah, in the Ta'izz-Ibb-Yarīm area (called by the report the Southern Uplands), and in the Ṣan'ā' area.[9] The UN project team classified farms into three tenure categories: "Owned Farms" (that is, those worked by their resident owner and often referred to in other studies as owner-farmed or owner-occupied farms); "Rented Farms" (that is to say, those worked by a tenant, whether on a sharecropping basis or a fixed rent basis); and "Mixed Farms" (presumably those on which part of the land is

[8] As was mentioned in Chapter 1 (Section 1.33 above), the Yemen government was understood by other Arab governments of the peninsula to support Iraq in that war and as a result the Yemeni workers in Saudi Arabia and the Gulf emirates were expelled.

[9] UN 1987: 3-4. The Southern Uplands region of the UN report covers the area around Ta'izz, Ibb and Yarīm and therefore coincides largely with the region called in this book the Southern Mountains, though (by including Yarīm) with the addition of the southern part of the Central Plateaux.

worked by the owner and part by a tenant, though this is not explained in the report).

Briefly, the findings of the UN team on the frequency of owner-occupancy versus tenancy were as follows.[10] The frequencies of the three tenure categories were 61% Owned, 19% Rented and 20% Mixed for the total sample of 263 farms.[11] The farms in the UN sample that were tenanted or partly tenanted (that is, in the terms of the report, the Rented Farms and the Mixed Farms taken together) amounted to 39% of the total sample (103 farms out of 263), though there was a large variation with region and district. Thus although in Tihāmah 43% of the farms were tenanted or partly tenanted overall, the actual proportion varied between 68% in Wādī Rimaʿ (19 farms out of a sample of 28) and only 26% in Wādī Mawr (9 farms out of 35). Again, the average for the Southern Uplands was 39% tenanted or partly tenanted, though at Ibb it was 53% (9 farms out of 17) and at Taʿizz only 30% (12 farms out of 40).

Regarding the frequency of sharecropping tenancies versus fixed rent tenancies, the UN report found that sharecropping tenancies were overwhelmingly more common.[12] In Tihāmah they accounted for 92% of the sample tenanted farms (54 farms), fixed rent existing on only the remaining 8% (5 farms), while in the Southern Uplands and the Ṣanʿā' area the preponderance of sharecropping was even greater, with 96% of the tenanted farms (44 farms) under sharecropping and only 4% (2 farms) with fixed rent. Further, according to the UN field data, sharecropping was particularly common on land

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[10] The following information has been extracted mainly from Tables 1-4 of the UN report (UN 1987: 5-7).

[11] These figures contrast with the officially published figures for approximately the same year. In terms of the area of agricultural land: 77.4% was owner-occupied (termed in the official source *milk*), 3.8% was rented for a fixed rent (*ījār*), and 18.8% was sharecropped (*sharākah*), as quoted from the official statistics for 1983 by Abū Ghānim 1990: 304-05, though because the official statistics have no category called "mixed", and yet distinguish between rented for a fixed rent and sharecropped, they are not directly comparable with the UN figures.

[12] The terminology the UN report uses can be criticised: in it, by "rent in kind" the authors evidently mean sharecropping, and by "rent in cash" they mean fixed rent. That this must be so is clear from the last sentence on p.5 of the report (UN 1987). As was pointed out above in Chapter 2 (Section 2.21) and as will be shown again later in this chapter (Section 6.44) the categorisation of tenancies into sharecropping and fixed rent is quite distinct from the categorisation into rent paid in cash and rent paid in kind: both sharecropping rents and fixed rents may be paid either in cash or in kind.

dependent entirely on rain and rather less common on land watered by a pump well. Conversely, the UN team recorded no cases of fixed rent on rain-dependent land and only one case on *sayl*-watered land. The authors of the report rightly explain this distribution as a result of the fluctuation in rainfall from season to season and the preference therefore for sharecropping on such lands, an explanation which has already been mentioned when the rationale of sharecropping was discussed (Chapter 2, Section 2.2).

Quite how the figures in the UN report can be related to the present field survey data is an extremely difficult question. First, as has been mentioned above, the figures vary considerably from district to district, and none of the sample districts chosen by the UN team coincides exactly with the sample areas of the present survey. Second, the UN data refers to the position in the mid 1980s (specifically, late 1985 and early 1986, the period when UN team carried out their field work), whereas the present survey material was gathered mostly in mid-1993. In the seven and a half years between the two surveys the Yemen had undergone much social and economic change, including especially the effects of the unification between the Yemen Arab Republic and the People's Democratic Republic of Yemen and the forced return of expatriate Yemeni workers from Saudi Arabia and the Gulf states in the aftermath of the war against Iraq. Clearly therefore the results of the UN survey are not directly comparable with those of the present survey.

Nevertheless, despite these difficulties of comparability, in at least one general finding, namely, the great preference for sharecropping tenancies over fixed rent tenancies, the situation as recorded by the UN survey reflects that encountered in the present survey as will now be shown.

6.33 Sharecropping versus *Fixed Rent Tenancies, according to the present survey*

From the field interviews conducted in 1992 and 1993, 136 cases of rental systems were extracted. These "cases" are not cases of individual farmers, but rather instances the farmers and landowners gave of the rental systems in which they were involved. An individual landowner may have different systems in operation on different parts of his land—for different crops, for example, or for different sources of water. Equally, a tenant might well pay a fixed rent on part of the land he farms, and different percentages of the crop under different sharecropping systems on other parts, according to different crops or

water sources or to different landowners. Again, a farmer may be a landowner who lets his own land to a tenant under one rental system while at the same time farming another landowner's land as a tenant in another district under a different system. The same kind of complexity in land tenure has also been noted by other researchers in the Yemen.[13]

Asking a farmer "What rental system do you use?" therefore frequently produces several answers. It is these answers then which are the basis of the cases considered here. Table 6.2 summarises the overall situation as reflected in the interviews.

Table 6.2. Land and water rental: overall view

	Numbers of Cases			
System	Land and Water or Land only rented	Water only rented	Total Cases	
Fixed Rent	14	1	15	(11.0%)
Sharecropping	118	3	121	(89.0%)
Totals	132	4	136	(100.0%)

Source: Field Survey

As can be seen from this table, of the 132 cases of land rental the tenant paid a fixed rent to the landowner in only fourteen. In the remaining 118 the land rental was expressed and paid in terms of a proportion of the harvest under one or other of the many sharecropping systems to be identified below in Section 6.4. In the four cases recorded where a landowner rented water only and not land from a third party and then used it on his own land, the amount of the rental was a proportion of the harvest in three of them. Overall, therefore, sharecropping accounts for 89% of the cases in the present survey and fixed rent only 11%, a situation broadly similar to that

[13] For example, by Escher (1976: 83-85) in Wādī Mawr; by Makin ((ed.) 1977: 56) in lower Wādī Rima'; and by Mitchell (1978: 22 and 56-58) in lower Wādī Mawr and in the area between Ta'izz and al-Turbah. As has already been mentioned, the 1987 UN report had to include a category of "Mixed Farms" which were partly leased and partly owner-occupied and this category accounted for a substantial proportion of the total sample.

found in the UN report discussed above. This finding also agrees with observations and conclusions from other researchers and agricultural consultants who have worked in the Yemen, though the fact is rarely discussed in detail.[14] It is likely therefore that the finding of the present survey that sharecropping as a rental system is overwhelmingly more important than fixed rent payment reflects the situation in northern Yemen as a whole.

6.34 Fixed Rent Tenancies

Table 6.2 above shows that only 14 cases of fixed rent tenancy for land and one case of fixed rent tenancy for water only emerged from the 136 cases found in the interview survey. These are broken down by source of water in Table 6.3. Because of the small numbers of cases involved, no generalised conclusions can be drawn from this distribution by water source beyond the comment that instances of fixed rents were found in land watered by all sources of water except *sayl* (which were in any case few in number in the survey) but that they formed only a small proportion of the total cases of land tenancy.

Table 6.3. Land and water rental: fixed rent systems by source of water

	Numbers of Cases					
	rain	*ghayl*	*sayl*	well	source not specified	Totals
Cases of Fixed Rental for Land (or Water and Land)	3	5	0	4	2	14
Cases of Fixed Rental for Water only	0	0	0	1	0	1
Total Fixed Rental Cases	3	5	0	5	2	15

Source: Field Survey

Of the 14 cases of fixed rents for land (or land and water), details were recorded of the rent for ten cases. These ten are shown in Table 6.4. It will be noted from this table that these rents are quoted in

[14] The predominance of crop-sharing has also been remarked in passing by Escher 1976: 82 ff. and Mitchell *et al.* 1978: 43 (both in lower Wādī Mawr); and Mundy 1981: 62 (in Wādī Ẓahr); and the finding is in line also with the 1983 figures quoted by Abū Ghānim (1990: 304-05) and given in note 11 above.

Table 6.4. Land rental : details of fixed rents

Water source	Location	Crops	Details of Fixed Rent in units as given by respondents per year	Approximate metric equivalent per year
Rain	Shibām	grains	3 *qadaḥs* per 25 *libnah*	123 li. per 1875 m^2
Ghayl	al-Ahjur	grains	1 *qadaḥ* per *libnah*, plus 3/4 of the sugarcane crop	20½ li. per 75 m^2
	al-Ahjur	vegetables	value of ½ *qadaḥ* sorghum per *libnah*	20½ li. per 75 m^2
	al-Ahjur	tree fruits	1 *thumānī* per *libnah*	5 li. per 75 m^2
	Dhī al-Sufāl	grains	3 *thumnahs*	15½ li.
	Dhī al-Sufāl	vegetables	½ *qadaḥ*	20½ li.
Well	'Amrān	vegetables	YR 400 per *libnah*	YR 400 per 75 m^2
	al-Suwayq	unspecified	YR 1000 per *ma'ād*	YR 1000 per 4000 m^2
	al-Suwayq	unspecified	YR 1000 per *ma'ād*	YR 1000 per 4000 m^2
Unspe-cified	al-Suwayq	unspecified	YR 500 to 700 per *ma'ād*	YR 500 to 700 per 4000 m^2

Source: Field Survey

Notes on the Units in Table 6.4:

Units of Capacity:
The *qadaḥ* is a large measure of capacity widely used in Yemen. The unit varies in size according to region but the Ṣan'ānī *qadaḥ* is extensively known and quoted and is generally equivalent to around 41 litres. The *thumānī* and *thumnah* are medium-sized units of capacity widely used on the high plateaux and in the mountains of northern Yemen, the former north of Ṣan'ā' and the latter to the south. Generally, eight of either make a *qadaḥ*, and although the units vary in size according to region, they tend to be equivalent to about five litres. For a fuller discussion on Yemeni units of capacity, see Donaldson 1996.

Units of Area:
The *libnah* or *lubnah* is an areal measure used widely on the high plateaux and in the mountains of the northern part of the Yemen. It varies widely in size from 16 x 16 *dhirā'* (cubits) in some areas to as little as 10 x 10 *dhirā'* in other areas, and the fact that the *dhirā'* is also variable makes calculating metric equivalents very problematic. An arbitrary standard for the *libnah* of 75 m^2 has been used in calculating the metric equivalencies in the above table. The *ma'ād* is a large unit of areal measurement used on the plain of Tihāmah but not in the mountains or on the plateaux. It varies between about 3,300 m^2 and 4,356 m^2, according to district. An arbitrary standard of 4,000 m^2 has been adopted in calculating the metric equivalencies above.

terms of a volume of grain (or its value) per area of land per year in all the cases in which rain and *ghayl* were the source of water, but that in the cases in which the water was from wells the rent is quoted in terms of Yemeni riyāls per unit area. Since the sample is so small no general conclusions can of course be safely drawn from this, and further, comparison between the various cases is extremely difficult because of the wide variation in the sizes of both areal units and units of capacity throughout Yemen.[15] Nevertheless, the information does clearly underline the point already made in Chapter 2 (Section 2.21) and elsewhere that fixed rents can perfectly well be quoted and paid in kind (*'ayn*^{m}) as well as in cash (*naqd*^{m}).

6.4 SHARING SYSTEMS

6.41 General Considerations

The systems for dividing the crop between landowner and sharecropper (and where a pump well is involved, the pump owner also) are so various in Yemen that generalisations are very difficult to make.[16] Even within restricted areas there is no simple relationship between the various crop-sharing systems and any of the identifiable factors which might influence them. Within a settlement the variation in systems can be great and an individual farmer may be involved in several systems at once. Despite the variety of systems it is however noteworthy that during the field survey in the Yemen no example was ever found of the type of sharecropping system which the Prophetic *ḥadīth*s explicitly forbid and which was discussed above at some length in Chapter 3 (Section 3.33) and in Chapter 5 (Section 5.3): that is, the system in which the crop is divided by area, with one party taking his share from one plot of the land and the other party taking his share from another plot. It would however be practically impossible to decide whether or not the absence of such a system in present day Yemen is the result of farmers consciously obeying the Prophetic injunction.

From the respondents in the field survey 17 separate sharecropping systems were identified, of which two concern cases where water only

[15] See the notes accompanying Table 6.4.

[16] The picture painted of sharing systems by Abū Ghānim (1990: 304), for example, is very much a simplification of the actual situation.

(and not land) was being rented. These are shown in Table 6.5, labelled A to S (omitting I and O) and arranged according to the size of the landowner's share. Systems A to K involve contracts in which there are only two parties (the landowner and the tenant), whereas systems L to Q have a water owner as a third party. In systems R and S it is not land that is being leased but water, and so there are two parties, landowner and water owner.

As can be seen from the table, the proportion of the harvest paid to the landowner for the use of the land varies from 4/5 in one case to only 1/10 at the other extreme. The proportion retained by the tenant varies conversely: from as high as 9/10 in one case to as low as 1/5 in another. However, by far the most common systems are by halves, thirds or quarters. Of the 101 cases where only two parties are involved (systems A to K), system D (1/2 : 1/2) accounted for one-third of the total, and system E (1/3 : 2/3) and system F (1/4 : 3/4) for about one-quarter each. Of the 17 cases where a water owner is involved as a third party, two-thirds are accounted for by systems N and P (1/4 : 1/4 : 1/2, and 1/6 : 1/3 : 1/2). In contrast, division by fifths, sixths, eighths or tenths is very much less common, though still significant in some instances. Certain other researchers and agricultural consultants working in the Yemen have reported a similar wide range of variation. In the 1987 UN report, which has already been referred to above, a total of at least 11 different systems are recorded and most of them similarly involve splitting by halves, quarters and thirds.[17]

There are undoubtedly many factors underlying the variability of these sharecropping systems. Several can be identified in terms of which the data are amenable to analysis, though even in combination they cannot explain the variability wholly. One factor—whether the supplier of agricultural inputs (notably seed and fertiliser) is the landowner or the sharecropper—has already been noted above in Chapter 2 (Section 2.23) and it was shown there that the degree to which the landowner contributes will influence the size of his share, even though often only theoretically. This was found to be generally applicable in the field survey concerning the supply of seed and fertiliser though variation was very marked and correspondence was not always reflected in practice. The relationship was most evident in the case of the supply of water, as will be shown below.

[17] UN 1987: 22-24.

Table 6.5. Land and water rental: crop sharing systems

Landowner : Sharecropper

Sharing System	Share of harvest to:		Total number of cases
	Landowner	Sharecropper	
A	4/5	1/5	1
B	3/4	1/4	4
C	2/3	1/3	3
D	1/2	1/2	33
E	1/3	2/3	26
F	1/4	3/4	23
G	1/5	4/5	5
H	1/6	5/6	3
J	1/8	7/8	2
K	1/10	9/10	1
		Total	101

Landowner : Sharecropper : Water Owner

Sharing System	Share of harvest to:			Total number of cases
	Landowner	Sharecropper	Water Owner	
L	1/3	1/3	1/3	3
M	1/4	1/2	1/4	1
N	1/4	1/4	1/2	6
P	1/6	1/3	1/2	6
Q	1/8	3/8	1/2	1
			Total	17

Landowner : Water Owner

Sharing System	Share of harvest to:		Total number of cases
	Landowner	Water Owner	
R	1/2	1/2	2
S	1/3	2/3	1
		Total	3

Source: Field Survey

Potential factors on the size of the share which can be considered here are: (1) the nature of the source of agricultural water; (2) the region in which the cases were recorded; (3) the type of crops grown; (4) the nature of the landowner (whether a private individual, a *waqf* or the state).

6.42 Crop-Sharing Systems by Source of Water

Table 6.6 shows the position when broken down by the source of water. From this table it can be seen that almost half the 121 share-

Table 6.6. Land rental and sharing systems by source of water

System	Share of harvest to:			Number of Cases: Source of water:					Total cases
	Land-owner	Share-cropper	Water owner	rain	*ghayl*	*sayl*	well	source unspec'd	
A	4/5	1/5		-	-	1	-	-	1
B	3/4	1/4		-	-	-	3	1	4
C	2/3	1/3		-	-	1	2	-	3
D	1/2	1/2		11	9	1	10	2	33
E	1/3	2/3		6	9	1	8	2	26
F	1/4	3/4		15	-	1	7	-	23
G	1/5	4/5		2	-	-	3	-	5
H	1/6	5/6		-	-	-	3	-	3
J	1/8	7/8		1	-	-	1	-	2
K	1/10	9/10		-	-	-	1	-	1
	Total Systems A to K								101
L	1/3	1/3	1/3	-	-	-	3	-	3
M	1/4	1/2	1/4	-	-	-	1	-	1
N	1/4	1/4	1/2	-	-	-	6	-	6
P	1/6	1/3	1/2	-	-	-	6	-	6
Q	1/8	3/8	1/2	-	-	-	1	-	1
	Total Systems L to Q								17
R	1/2		1/2	-	-	-	2	-	2
S	1/3		2/3	-	-	-	1	-	1
	Total Systems R and S								3
	All sharecropping systems			35	18	5	58	5	121

Source: Field Survey.

cropping cases found in the field concerned land watered by wells (58 cases) and that most of the remainder were of tenancies on rain-fed land (35 cases). Only five cases applied to water from a *sayl* source, though as was pointed out above (Section 6.22), the low showing of *sayl* cases is to do with the deficiencies of the survey coverage and does not represent the importance of *sayl* in the Yemen as a whole.

In the cases which involved *ghayl* irrigation the landowner received either a half or a third of the harvest and the sharecropping tenant either a half or two-thirds. No other crop-sharing system was found with this source of water. Of the five cases of *sayl* irrigation, all but one gave the landowner similarly at least one-third of the harvest, and in one case (System A) as much as 4/5 of the harvest, leaving only 1/5 for the tenant.

With rain as the water source the share taken by sharecropping tenants was, on the whole, more generous. In over half these cases (18 out of the 35 cases of sharecropping on rain-fed land) the tenant received at least 3/4 of the harvest, and in one case (System J) as much as 7/8. The landowner was therefore left with a proportionately smaller share on the whole than under *ghayl* and *sayl* irrigation.

The greatest range of different systems was undoubtedly found in the cases which involved water from wells. In three cases (System B) the landowner took 3/4 of the harvest, leaving the sharecropper with only 1/4, while at the other end of the scale (Systems J, K and Q), the share of the landowner was only 1/8 or 1/10 of the harvest. Such differences between the water sources require explanation.

(a) Land irrigated by *ghayl* and *sayl*

The relatively large share for the landowner in most of the cases of *ghayl* and *sayl* irrigation can be largely explained, and is generally in the Yemen justified, by the fact that the water rights on land capable of being irrigated by these two sources of water is inalienable from the ownership of the land itself. In the case of *ghayl*s, the use of the irrigation water is prescribed in detail according to tradition extending back in most cases probably many centuries in predominantly *ghayl* areas. According to the present survey informants, land which has *ghayl* rights is rarely if ever bought or sold without those rights. Even though there may be an active local market in selling *ghayl* water, especially in the rainless winter season, as occurs for example in both Dhī al-Sufāl and al-Ahjur, the market concerns sales by the hour or the day and not sales of the water rights separately from the land. In

the case of *sayl* irrigation the rights to the spate flow are riparian and are similarly attached to the land by long tradition. In both *ghayl* and *sayl* irrigated lands the tenant is therefore renting not just the land but the water rights attached to it, and the relatively large share of the harvest that a sharecropper on such land delivers to the landowner reflects this fact.

(b) Rain-fed land

Land watered only by rain is of a different nature in two respects. First, rain water falling directly from the sky without any natural or artificial storage or channelling is regarded in Islamic law as *mubāḥ* (ownerless and free to all)—until, that is, the water happens to land on a particular piece of ground which has an owner. Given its variable and unpredictable nature, rain water cannot be measured out by the volume or by the hour of flow and, in contrast to *ghayl* and *sayl*, cannot be charged for. This is reflected in the generally smaller share taken by the landowner and the more generous share allotted to the sharecropper when the sole source of water is rainfall.

A second difference from *ghayl* and *sayl* land which explains the generally higher share taken by the sharecropper on rain-fed land can also be identified and has in fact been already referred to above in the more general context in Chapter 2 (Section 2.24). By and large in many parts of the Yemen as in other arid or semi-arid environments, agriculture reliant solely on rain tends to economic marginality. If too large a share were to be exacted by a landowner then his tenants eventually would cease to survive and he himself would be the poorer in the long run. This line of reasoning was believed to be reflected in several of the interviews of the present survey by phrases such as *'alā asās min ma'ar al-sharīk* (because of the poverty of the sharecropper) when the respondents were asked to explain the generally higher share for the tenant on rain-fed land.

(c) Land irrigated by wells

Land watered by wells contrasts with both rain-fed land and *ghayl* and *sayl* land. Unlike rain, well water is owned. Unlike *ghayl* and *sayl*, the rights to the water are not so firmly attached to the land.

The principles of water rights concerning wells in Islamic countries constitute a complex subject and have in any case been reviewed by

other authors elsewhere.[18] In the present context, it may be stated briefly that the rights to ownership of water from wells stem from the costs (labour, materials, finance) which are expended first in digging the well and second in making the water usable (that is, bringing it to the surface). Water from a well on owned land is therefore not *mubāḥ* like rain, nor do the rights to it stem wholly from its being attached to the land by tradition as in the case of *ghayl* and *sayl* water. As a result, it is very much more frequently the case than with *ghayl* and *sayl* water that a landowner or a tenant will rent water from the well of a neighbour, either for a fixed rent per hour or per day, or else, more commonly, under a sharecropping arrangement. For this reason, the water owner appears as a third party in a sharecropping agreement between a landowner and a sharecropper. Moreover, by far the majority of agricultural wells in the Yemen are nowadays worked by motor pumps (either added to traditional wells to replace animal power, or else, and increasingly, working in association with new tube wells), and consequently there will also be a pump owner. In most cases the owner of the pump will be one and the same with the owner of the well, though this is not necessarily so. Any analysis of the situation is complicated further by the fact that the water owner may be a third party only notionally rather than a person distinct from the landowner and the sharecropper. Either of the latter two parties may be the notional third party, and in some cases both may actually own a share of the water in that they jointly own the pump.

It is here suggested that these are the reasons why the variety of sharecropping systems involving well water as they were quoted in the present survey appears very much greater than the range of systems for the other sources of water. The 1987 UN report on Yemeni sharecropping and land tenure already cited above similarly found that land irrigated by wells was subject to much greater variety of

[18] An article by Victor Chauvin (1899) (for a copy of which I am indebted to Nadim H. Salameh of Mainz University), which is largely an analysis of the systematisation of the great Shāfi'ī lawyer Abū al-Ḥasan al-Māwardī (d. 450/1058), and a doctoral thesis by Henri Bruno (1913), which discusses the subject in greater detail, seem to have been the first detailed study of Islamic water laws by European experts. A more modern survey is FAO 1973 which provides a brief synthesis of the subject. For specifically the Yemen, see also Varisco 1982: 19-35 and Ch.6; and Maktari 1971, especially Ch.1.

Table 6.7. Land rental and sharing systems : well water

System	Share of harvest to: Land-owner	Share-cropper	Water Owner	Number of cases involving well water rental	Identity of water owner: Land-owner	Share-cropper	Neigh-bour	not stated
B	3/4	1/4		3	3	-	-	-
C	2/3	1/3		2	2	-	-	-
D	1/2	1/2		10	7	1	-	2
E	1/3	2/3		8	2	5	1	-
F	1/4	3/4		7	-	6	-	1
G	1/5	4/5		3	-	3	-	-
H	1/6	5/6		3	-	2	1	-
J	1/8	7/8		1	-	1	-	-
K	1/10	9/10		1	-	1	-	-
L	1/3	1/3	1/3	3	2	-	1	-
M	1/4	1/2	1/4	1	-	-	1	-
N	1/4	1/4	1/2	6	-	-	5	1
P	1/6	1/3	1/2	6	2	-	4	-
Q	1/8	3/8	1/2	1	-	1	-	-
All sharecropping systems involving land and well water:				55	18	20	13	4

Source: Field Survey.

crop-sharing systems than land watered by other means, though that report offered no explanations as to why this should be so.[19]

To make the position clearer given the present figures, Table 6.7 has been extracted from the previous table (Table 6.6) and combined with other information from each case concerning water ownership. (Sharing systems R and S have been omitted since they concern rental of water only, not land, and there is therefore no ambiguity with these.)

In the systems where a share of the crop is specifically set aside for the water owner (Systems L to Q) the position is relatively straightforward. As can be seen in the table, the water owner may in any individual case be either the landowner (four cases) or the sharecropping tenant (one case) or a neighbour (eleven cases). As can also be seen from the table however, most of the systems (B to K) do not make any

[19] UN 1987: 23-24.

specific provision for the water owner in terms of a share of the crop. In one of these cases (under System E) the water owner was a third party, which requires explanation, though in all the others the water owner was either the landowner or the sharecropper.

In the cases where the share of the harvest to the landowner is 3/4 or 2/3, the water owner was also the landowner. That is to say, the sharecropping tenant was leasing from the landowner not only the land but also the water, and the landowner's share was consequently large relative to his own. Similarly, of the ten cases where the harvest was divided equally between landowner and sharecropper (System D), the landowner was also water owner in seven, and in only one known case of the ten did the sharecropper own the water. In this one known case (from an interview with a farmer in al-Mayfa'ah, between Dhamār and Radā'), the pump and well were in fact owned by a *sharikah*, a joint association of farmers each of whom had shares in the pump and one of whom was in fact the landowner.

In contrast, in all but four of the cases where the tenant's share was larger than the landowner's and no separate provision was made for the water owner (18 cases, Systems E, F, G, H, J and K), the table shows that the water owner was the tenant, which is what one would anticipate, given his large share. In the four exceptional cases (three in Systems E and one in System H), the water owner was either the landowner or a neighbour. In each of these four cases (one in Najr, one in al-Qā'idah, one in Shibām and one in al-Kahaylah) the sharecropper paid separately in cash for his water, or at least for the diesel to run the water pump, and consequently the supply of water in these cases lies outwith the crop-sharing system.

With the exception of these very few cases in which water was paid for separately, all the sharecropping systems thus conform to a general principle that provision of water guarantees a share of the harvest whether or not this share is explicitly stated as a separate share. This applies as much to water-owning landowners and water-owning sharecroppers as to third party water owners since whichever party provided the water their share was larger in almost all cases.

On the basis of the above discussion as far as sharecropping on land watered by wells is concerned (though not land watered from other sources), it is possible therefore to rearrange the systems as they have been discussed until now and to combine some of them on the principle that a share of the harvest for the water owner is at least implicit in all the systems. This rearrangement is done in Table 6.8, with the new seven systems labelled I to VII. In Systems IV and VII

Table 6.8. Land rental and sharing systems: well water

System	Share of harvest to:			Number of cases involving well water rental	Identity of water owner:			
	Land-owner	Share-cropper	Water owner		Land-owner	Share-cropper	Neigh-bour	not stated
I (B & N)	1/4	1/4	1/2	9	3	-	5	1
II (C, E & L)	1/3	1/3	1/3	13	6	5	2	-
III (D, F & M)	1/4	1/2	1/4	18	7	7	1	3
IV (G)	1/5	3/10	1/2	3	-	3	-	-
V (H & P)	1/6	1/3	1/2	9	2	2	5	-
VI (J & Q)	1/8	3/8	1/2	2	-	2	-	-
VII (K)	1/10	2/5	1/2	1	-	1	-	-
All sharecropping systems involving land and well water:				55	18	20	13	4

Source: Field Survey.

the share of the notional third party water owner (the tenant in all four cases under these systems) has been assumed to be 1/2 of the harvest since this is the most common proportion allotted to the water provider in the systems where it is known and such a division provides a simpler residual for the tenant's share than either a third or a quarter would.

These seven systems form then the classification of sharecropping systems where wells are the water source and they will be used in future discussion. As can be seen, the number of sharing systems which involve wells has been reduced by this means from fourteen to seven, and of the 55 cases the large majority (31 cases) come under only two systems (Systems II and III) in both of which the water owner is more likely to be either the landowner or the tenant than a third party neighbour. This being the case, it is probably significant that these two systems are the only systems under which less than one-half the crop is assigned to him as notional third party water owner. In nearly all the remaining cases one of two other systems are used (18 cases, Systems I and V), and in these the water owner is most likely to be a third party neighbour rather than the landowner or the tenant and his share as third party water owner under both systems is one-half the crop. The tendency for third party water owners to take

one-half the crop has also been found by the UN survey referred to above and also a 1977 UK Overseas Development Administration survey of lower Wādī Rima' in Central Tihāmah.[20]

6.43 Crop-Sharing Systems by Region

The regions which have been used to classify the field locations on the basis of climate, water source and topography were given in Table 6.1 and Figure 6.1 above. Table 6.9 shows the 113 cases of sharecropping systems which involve land and for which the water source is recorded, as gathered from the 66 interviews and broken down by source of water and by region.

As may be observed from this table, the Central Plateaux region has a wider variety of systems than the other regions in both rain-fed land and well-irrigated land, but generally speaking one or two systems stand out as dominant in all the regions for a given source of water. These dominant systems are shown together in Table 6.10.[21]

From these two tables, 6.9 and 6.10, it can be seen that, according to the field information, a sharing system in which the landowner takes 1/4 of the crop, leaving the sharecropper with 3/4, is dominant on rain-fed land in all the regions in which rain figured as an important water source except the Northern Plateaux where all four cases involved a 1/2 : 1/2 system, while in the Southern Mountains 1/3 of the harvest to the landowner and 2/3 to the sharecropper was as common as the 1/4 : 3/4 system.

In the two regions in which *ghayl*s are important, a 1/2 : 1/2 system was dominant in the Southern Mountains but in the Northern Mountains a system in which the landowner takes 1/3 and the sharecropper 2/3 was more common.

On land irrigated by wells in the Northern Mountains, the Central Plateaux and the Southern Mountains the crop was most usually split 1/4 to the landowner, 1/2 to the sharecropper and 1/4 to the well and pump owner, though in the Northern Plateaux the most common system was 1/3 to each of the three parties, while in Central Tihāmah two systems were almost equally common, in both of which half the

[20] UN 1987: 23; Makin (ed.) 1977: 57.

[21] The *sayl*-irrigated cases have been combined with the *ghayl* cases in this table since so few sharing systems involving *sayl* were included in the field survey and yet in terms of water ownership both are similar in that water rights are attached to the land, as has been discussed above (Section 6.42).

crop goes to the water owner with either 1/3 or 1/4 taken by the sharecropper.

6.44 Crop-Sharing Systems by Crop

As was mentioned above in Chapter 1 (Section 1.3), the crops which cover most of the agricultural land in the Yemen are grains, and of these the various varieties of sorghum are the most common. This preponderance of grains is reflected in the field survey material. Most other crops are cash crops, or may be treated as such. For this analysis the crops can be considered under the following main categories:

1) grains;
2) tree fruits (deciduous fruit, dates, coffee and bananas);
3) *qāt*;
4) vegetables (including potatoes);
5) other cash crops (cotton and tobacco).

Using the information derived from the interviews, it is possible to break the sharecropping systems down on the basis of these categories of crops. This is done in Table 6.11.[22] The table shows that on rain-fed land by far the most common sharing system for grains is 1/4 of the crop to the landowner and 3/4 to the sharecropper (System F, 13 cases out of 28), whereas for *qāt* the crop is more frequently divided equally between the two parties (System D, four cases out of seven). The other categories of crops on rain-fed land have unfortunately too few cases for any generalisations to be made.

On *ghayl*-irrigated land, both grains and vegetables are most frequently shared on an equal basis between landowner and sharecropper (System D, seven cases out of eight for grain, and all three cases for vegetables), whereas for both tree fruit and *qāt* the cases are almost equally divided between a 1/2 : 1/2 system (System D) and a system under which 1/3 goes to the landowner and 2/3 to the sharecropper (System E). On *sayl* land the numbers are too small for any generalisations to be made.

[22] Many responses from the interview survey indicated that more than one crop in any given case was subject to the same sharing system. For example, one farmer might say that he had grain and vegetables under one system on rain-fed land and *qāt*, tree fruit and other vegetables under another system on land watered by a well. Such an example would be included on the table as two cases on rain-fed land and three cases on well-watered land. For this reason the numbers of cases in each water source category are larger than the numbers given in Table 6.5 and subsequent tables.

Table 6.9. Sharing systems by water source and by region

	Share of harvest to:			Region:					All Regions
	Land-owner	Share-cropper	Water Owner	Northern Mountains	Northern Plateaux	Central Plateaux	Southern Mountains	Central Tihāmah	
Rain:									
D	1/2	1/2		1	4	3	2	1	11
E	1/3	2/3		-	-	2	4	-	6
F	1/4	3/4		6	-	5	4	-	15
G	1/5	4/5		-	-	2	-	-	2
J	1/8	7/8		-	-	1	-	-	1
	Total rain cases			7	4	13	10	1	35
Ghayl:									
D	1/2	1/2		5	-	-	4	-	9
E	1/3	2/3		8	-	-	1	-	9
	Total *ghayl* cases			13	-	-	5	-	18
Sayl:									
A	4/5	1/5		-	-	-	-	1	1
C	2/3	1/3		-	-	-	1	-	1
D	1/2	1/2		-	-	-	1	-	1
E	1/3	2/3		1	-	-	-	-	1
F	1/4	3/4		1	-	-	-	-	1
	Total *sayl* cases			2	-	-	2	1	5
Well:									
I	1/4	1/4	1/2	2	1	1	-	5	9
II	1/3	1/3	1/3	2	5	1	3	2	13
III	1/4	1/2	1/4	3	-	10	4	1	18
IV	1/5	3/10	1/2	-	1	1	-	1	3
V	1/6	1/3	1/2	-	-	3	-	6	9
VI	1/8	3/8	1/2	-	-	3	-	6	9
VII	1/10	2/5	1/2	-	-	1	-	-	1
	Total well cases			7	7	19	7	15	55
Total cases, all water sources				27	13	32	24	17	113

Source: Field Survey.

Table 6.10. Dominant sharing systems by region

Source of water	Region	Share of crop to:			No. of cases out of total
		Land-owner	Share-cropper	Water owner	
Rain:	Northern Mountains	1/4	3/4		6 out of 7
	Northern Plateaux	1/2	1/2		4 out of 4
	Central Plateaux	1/4	3/4		5 out of 13
	Southern Mountains	1/4 1/3	3/4 2/3		4 out of 10 4 out of 10
Ghayl and *Sayl*:	Northern Mountains	1/3	2/3		9 out of 15
	Southern Mountains	1/2	1/2		5 out of 7
Well:	Northern Mountains	1/4	1/2	1/4	3 out of 7
	Northern Plateaux	1/3	1/3	1/3	5 out of 7
	Central Plateaux	1/4	1/2	1/4	10 out of 19
	Southern Mountains	1/4 1/3	1/2 1/3	1/4 1/3	4 out of 7 3 out of 7
	Central Tihāmah	1/6 1/4	1/3 1/4	1/2 1/2	6 out of 15 5 out of 15

Source: Field Survey.

On land irrigated by wells the position is more complex, largely because of the larger number of sharing systems involved. However, it may be remarked that the commonest system (System III, which gives 1/4 of the crop to the landowner, 1/2 to the sharecropper and 1/4 to the water owner) is applicable irrespectively to grains, tree fruit and vegetables and also to half the cases involving *qāt*.

Tables 6.12 and 6.13 show the same information broken down by region, though, as was mentioned earlier (Section 6.22 above), these figures are simply what was found in the present survey and cannot be used as a basis to derive generally applicable conclusions. For such fine analysis a considerably larger initial field sample would have been required.

Table 6.11. Sharing systems by crop

Source of water and sharing system	Share of crop to:			grains	tree fruit	*qāt*	vegetables	other cash crops	Total cases for which crop specified
	Land-owner	Share-cropper	Water Owner						
Rain:									
D	1/2	1/2		6	-	4	-	-	10
E	1/3	2/3		6	1	1	2	-	10
F	1/4	3/4		13	1	2	2	-	18
G	1/5	4/5		2	-	-	-	-	2
J	1/8	7/8		1	-	-	-	-	1
Total cases watered by rain				28	2	7	4	-	41
Ghayl:									
D	1/2	1/2		7	4	3	3	-	17
E	1/3	2/3		1	5	3	-	-	9
Total cases watered by *ghayl*				8	9	6	3	-	26
Sayl:									
A	4/5	1/5		-	1	-	-	-	1
C	2/3	1/3		1	-	-	-	-	1
D	1/5	1/2		1	-	-	1	1	3
E	1/3	2/3		1	-	-	-	-	1
F	1/4	3/4		1	1	-	1	-	3
Total cases watered by *sayl*				4	2	-	2	1	9
Well:									
I	1/4	1/4	1/2	4	1	-	4	2	11
II	1/3	1/3	1/3	8	1	4	5	1	19
III	1/4	1/2	1/4	11	6	4	10	1	32
IV	1/5	3/10	1/2	2	2	-	2	1	7
V	1/6	1/3	1/2	7	3	-	7	1	18
VI	1/8	3/8	1/2	2	1	-	1	1	5
VII	1/10	2/5	1/2	1	-	-	-	-	1
Total cases watered by well				35	14	8	29	7	93

Source: Field survey

Table 6.12. Dominant sharing systems by region by crop

Region	Crop	Water source	Shares of crop to: Land-owner	Share-cropper	Water Owner	No. of cases out of total
Northern Mountains:	grains:	rain	1/4	3/4		6 out of 7
		ghayl	1/2	1/2		2 out of 2
		well	1/4	1/2	1/4	2 out of 2
	tree fruit:	*ghayl*	1/3	2/3		4 out of 6
		well	1/4	1/2	1/4	2 out of 2
	qāt:	*ghayl*	1/3	2/3		3 out of 4
Northern Plateaux:	grains:	rain	1/2	1/2		2 out of 2
		well	1/3	1/3	1/3	5 out of 5
	qāt:	rain	1/2	1/2		2 out of 2
		well	1/3	1/3	1/3	2 out of 2
	vegetables:	well	1/3	1/3	1/3	3 out of 3
Central Plateaux:	grains:	rain	1/4	3/4		4 out of 9
		well	1/4	1/2	1/4	5 out of 13
	tree fruit:	well	1/4	1/2	1/4	3 out of 7
	qāt:	rain	1/2	1/2		2 out of 2
		well	1/4	1/2	1/4	3 out of 3
	vegetables:	well	1/4	1/2	1/4	5 out of 10
Southern Mountains:	grains:	rain	1/3	2/3		4 out of 9
		ghayl	1/2	1/2		5 out of 6
		well	1/4	1/2	1/4	4 out of 5
	tree fruit:	*ghayl*	1/2	1/2		2 out of 3
	vegetables:	*ghayl*	1/2	1/2		3 out of 3
		well	1/4	1/2	1/4	4 out of 5
Central Tihāmah:	grains:	well	1/4	1/4	1/2	4 out of 10
		well	1/6	1/3	1/2	4 out of 10
	vegetables:	well	1/4	1/4	1/2	4 out of 10
		well	1/6	1/3	1/2	4 out of 10
	cotton:	well	1/4	1/4	1/2	2 out of 4

Source: Field Survey

Table 6.13. Dominant sharing systems by crop by water source by region

Crop	Water source	Region	Shares of crop to:			No. of cases out of total
			Land-owner	Share-cropper	Water Owner	
Grains:	rain	Northern Mountains	1/4	3/4		6 out of 7
	rain	Northern Plateaux	1/2	1/2		2 out of 2
	rain	Central Plateaux	1/4	3/4		4 out of 9
	rain	Southern Mountains	1/3	2/3		4 out of 9
	ghayl	Northern Mountains	1/2	1/2		2 out of 2
	ghayl	Southern Mountains	1/2	1/2		5 out of 6
	well	Northern Mountains	1/4	1/2	1/4	2 out of 2
	well	Northern Plateaux	1/3	1/3	1/3	5 out of 5
	well	Central Plateaux	1/4	1/2	1/4	5 out of 13
	well	Southern Mountains	1/4	1/2	1/4	5 out of 6
	well	Central Tihāmah	1/4	1/4	1/2	4 out of 10
	well	Central Tihāmah	1/6	1/3	1/2	4 out of 10
Tree Fruit:	*ghayl*	Northern Mountains	1/3	2/3		4 out of 6
	ghayl	Southern Mountains	1/2	1/2		2 out of 3
	well	Northern Mountains	1/4	1/2	1/4	2 out of 2
	well	Central Plateaux	1/4	1/2	1/4	3 out of 7
Qāt:	rain	Northern Plateaux	1/2	1/2		2 out of 2
	rain	Central Plateaux	1/2	1/2		2 out of 2
	ghayl	Northern Mountains	1/3	2/3		3 out of 4
	well	Northern Plateaux	1/3	1/3	1/3	2 out of 2
	well	Central Plateaux	1/4	1/2	1/4	3 out of 3
Vegetables:	*ghayl*	Southern Mountains	1/2	1/2		3 out of 3
	well	Northern Plateaux	1/3	1/3	1/3	3 out of 3
	well	Central Plateaux	1/4	1/2	1/4	5 out of 10
	well	Southern Mountains	1/4	1/2	1/4	4 out of 5
	well	Central Tihāmah	1/4	1/4	1/2	4 out of 10
	well	Central Tihāmah	1/6	1/3	1/2	4 out of 10
Cotton:	well	Central Tihāmah	1/4	1/4	1/2	2 out of 4

Source: Field Survey

6.45 Crop-Sharing Systems by Landowner

The large majority of the land tenancy cases derived from the field survey concerned *ḥurr* land (land owned by private individuals - 118 cases out of 132) as opposed to *waqf* land (13 cases) and *ṣāfiyah* (government) land (only two cases). The *waqf* cases were found in all regions of the survey except the Northern Plateaux, though most were recorded in the Northern Mountains and the Central Plateaux, and both of the two *ṣāfiyah* cases were noted in Central Tihāmah. Because of the very small total numbers of cases however no general deduction can be drawn from this sample distribution, though from other field information it is probably the case that *ṣāfiyah* land is particularly common in Tihāmah compared with other regions.

The cases are broken down by sharecropping system and source of water in Table 6.14. As can be seen from this table, one of the two *ṣāfiyah* cases concerned fixed rent tenancy and the other a case of well-irrigated land in which the crop was shared 1/6 to the landowner, 1/3 to the sharecropper and 1/2 to the pump owner. In the instance of *waqf* land two cases involved fixed rents, the remaining 11 cases being cases of sharecropping. Of these 11 *waqf* cases only three gave the landowner as much as 1/3 or 1/2 of the harvest, and two of these concerned *ghayl* irrigation, while in five *waqf* cases the landowner's share was 1/5 or less.

This distribution contrasts markedly with the sharing situation where the landowner was a private individual. Table 6.15, which summarises the position from the point of view of the landowner's share, makes this clearer. Although a landowner's share of 1/4 of the crop is the most common system on both *waqf* land and privately owned land, a smaller share than 1/4 is taken by the landowner in 50% of the cases of *waqf* (and *ṣāfiyah*) land but in only 12% of the cases on privately owned land. That is to say, a *waqf* landowner tends to take a smaller share of the harvest than a private landowner according to the cases from the field survey, and this conclusion agrees with more general statements of farmers in all areas visited which have *waqf* land: that *waqf* trustees are more generous landlords than are private individuals.

Table 6.14. Sharing systems by landowner

Source of water and sharing system	Share of crop to:			*Waqf* land	*Ṣāfyah* land	Privately owned land	Total cases
	Land-onwer	Share-cropper	Water Owner				
Rain:							
D	1/2	1/2		-	-	11	11
E	1/3	2/3		1	-	5	6
F	1/4	3/4		2	-	13	15
G	1/5	4/5		1	-	1	2
J	1/8	7/8		1	-	-	1
Total rain cases:				5	-	30	35
Ghayl:							
D	1/2	1/2		1	-	8	9
E	1/3	2/3		1	-	8	9
Total *ghayl* cases:				2	-	16	18
Sayl:							
A	4/5	1/5		-	-	1	1
C	2/3	1/3		-	-	1	1
D	1/2	1/2		-	-	1	1
E	1/3	2/3		-	-	1	1
F	1/4	3/4		-	-	1	1
Total *sayl* cases:			-	-	-	5	5
Well:							
I	1/4	1/4	1/2	1	-	8	9
II	1/3	1/3	1/3	-	-	13	13
III	1/4	1/2	1/4	-	-	18	18
IV	1/5	3/10	1/2	-	-	3	3
V	1/6	1/3	1/2	1	1	7	9
VI	1/8	3/8	1/2	1	-	1	2
VII	1/10	2/5	1/2	1	-	-	1
Total well cases:				4	1	50	55
Total cases for which water source known:				11	1	101	113
Cases for which water source unknown:				-	-	5	5
Total sharecropping cases:				11	1	106	118
Fixed rent cases:				2	1	11	14

Source: Field survey.

Table 6.15. Sharing systems by landowner—summary

	Waqf and *Ṣāfiyah* land		Privately owned land	
Share to Landowner	no. of cases	% of total	no. of cases	% of total
>1/2	-	-	2	2.0
1/2	1	8.3	20	19.8
1/3	2	16.7	27	26.7
1/4	3	25.0	40	39.6
Total 1/4 and more	6	50%	89	88%
1/5	1	8.3	4	4.0
1/6	2	16.7	7	6.9
1/8	2	16.7	1	1.0
1/10	1	8.3	-	-
Total 1/5 and less	6	50%	12	12%
All sharecropping cases	12	100.0%	101	100.0%

Source: Field Survey.

6.5 CONCLUDING REMARKS ON THE CURRENT YEMENI SITUATION

In the analysis of the crop-sharing systems in the sections above, all the results are strictly valid only for the specific settlements covered by the present field survey and only for the specific period of the survey (the summers of 1992 and 1993). Even with these restrictions, the small sizes of some of the subsamples makes detailed generalised conclusions largely impossible, and certainly no conclusions applicable to the northern Yemen as a whole can be made with assurance without corroborative evidence from other sources. On the other hand, there is great difficulty in finding such evidence. As D.M. Varisco has complained, the information on sharecropping in the Yemen as a whole is "often confusing and difficult to interpret, due to lack of specific information on the total context of application".[23] What he had in mind was not only the considerable variability of the sharing systems from location to location and from one farmer to

[23] Varisco 1982: 257.

another, but also that that variability can be interpreted only in relation to crops, soil fertility, method of irrigation, and so on, which is generally the kind of detail that is not given by most of the available field studies. Even an extensive search in the literature has yielded little comparative information since other field surveys tend to record insufficient detail about the conditions surrounding different sharecropping systems to allow a comparative analysis to be made with the findings of the present survey. In particular, the literature would seem to be silent on the subject of sharecropping animals, a practice which, though of less importance nowadays than formerly, still exists in the Yemen and a study of which is the subject of the next chapter, Chapter 7.

Nevertheless, such field studies as do provide some information against which the present findings can be assessed indicate the likelihood that the results detailed in the above analysis do reflect more generally applicable patterns to a large extent. For example, as was noted in the course of the analysis, the 1987 UN report already referred to above found that most pump owners in Tihāmah take one-half the crop, leaving the remainder to be shared in different proportions by the landowner and the sharecropper,[24] and a 1977 UK Overseas Development Administration report on Wādī Rima' in Central Tihāmah arrived at the same finding.[25] Again, in the Ibb and Ta'izz area (the Southern Mountains region of the present survey), the UN report discovered that the share of the tenant on *ghayl*-irrigated land is one-half the crop, while on well-irrigated land in the same area his share is most usually also one-half the crop unless he owns the water pump in which case his share rises to two-thirds or three-quarters.[26] All these findings concord with the results of the present survey and validate its accuracy at least to a limited degree and in general terms.

Certain generally applicable observations can therefore perhaps be drawn. First, within any given region the share of a sharecropper dependent on rain is likely to be higher than his neighbour who has access to a less risky source of water from a well or a *ghayl*. Second, a landowner who rents to a tenant only land and not water (the water being provided by the tenant from his own well or from rain, or else

[24] UN 1987: 23.
[25] Makin (ed.) 1977: 57.
[26] UN 1987: 24.

bought separately) will on the whole receive a smaller proportion of the crop than one who supplies water as well as land.

The question of why the dominant or preferred systems of crop-sharing for the same crop and same water source vary between regions is however practically impossible to explain, given the present limited data. According to these data, it is, for example, specifically not the case, as might be postulated a priori, that sharecroppers dependent solely on rain on the Northern Plateaux and Central Plateaux, where rainfall is relatively low on average and is also highly variable from year to year, tend to receive a larger share of the crop than do sharecroppers in the Southern Mountains where rainfall is relatively high and harvests therefore less risky than on the plateaux. Similarly, a sharecropper dependent on rain in one region does not necessarily take a larger share of the crop than a sharecropper using a less risky source of water in another region.

To explain such differences it would seem that the researcher has in the end no choice but fall back on the explanations the Yemeni farmers themselves give: crop-sharing systems differ from individual to individual for reasons of personal preference, and from place to place because of differences in the established customs from one place to another, *sālif al-balad* (according to the precedence of the place) and *ḥasab al-ʿurf* (according to custom).

CHAPTER SEVEN

SHARECROPPING ANIMALS IN THE YEMEN

7.1. INTRODUCTORY REMARKS

Sharecropping domestic animals is the same in principle as sharecropping land: the owner makes over his property (in this case an animal rather than a plot of land) to another party to tend for a limited or unlimited period in return for part of the produce.[1] As with sharecropping land, sharecropping animals may be viewed in either of two ways: (1) the owner hires the services of the second party, in which case the latter receives his wage as a proportion of the yield; or (2) the owner leases the usufruct to the second party, in which case the owner receives rent as a proportion of the yield. The system is quite distinct from the employment of paid shepherds or cattle-herdsmen on a fixed wage, in the same way that sharecropping land is distinct from the employment of paid agricultural labourers on a fixed wage.

The practice of sharecropping domestic animals, which are usually in the Yemen cows, sheep or goats, would seem to be one of the least studied aspects of Yemeni agriculture. Economically the practice is much less important today than it once was for reasons that will be given, but it is still significant especially in rural areas far from the main urban centres, as will be discussed in Section 7.3 below. The practice is known to exist or to have existed elsewhere in the Arab world, but with the exception of two mentions in more general studies of sharecropping by French colonial administrators in North Africa in the first half of the twentieth century,[2] it seems to have gone

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[1] It is recognised that the term "sharecropping animals" is not ideal, since the meaning of the word "crop" must be stretched somewhat to allow it to include the produce of animals. In French the term is usually *métayage de l'élevage* (lit. rearing sharecropping) or *société pour l'élevage* (partnership for rearing), both of which are acceptable. However, English seems to lack a proper term and "sharecropping animals" is used here *faute de mieux*.

[2] Louis Milliot, who was to become one of the most prominent lawyers in the French colonial régime in North Africa in the interwar period, devotes a chapter to

unremarked. Certainly Islamic jurisprudents give it no attention in their works of *fiqh*, in contrast to sharecropping land.[3]

In this present chapter the Yemeni terminology of sharecropping animals is first studied (Section 7.2), and then some remarks are made about the present incidence of the practice in the northern Yemen today (Section 7.3). The various sharing systems found are discussed in Section 7.4, and the chapter ends with a comparison with some available evidence on sharecropping animals from North Africa (Section 7.5). As in Chapter 6, most of the information discussed here derives from the field survey conducted by the present writer in 1992 and 1993, the methodology and coverage of which is described at the end of this book (pp. 215-23).

7.2 THE YEMENI TERMINOLOGY OF SHARECROPPING ANIMALS

Several different terms are used in the Yemen to name the practice of sharecropping animals, different regions preferring different terms. All the respondents questioned readily understood the term *sharākah bi-al-mawāshī* (sharecropping with animals) when used by the present writer as a neutral, non-regional description of the practice, but it is clearly not the usual expression employed by the rural Yemenis themselves.[4] Instead, the terms used vary considerably from area to area, though all tend to be derived from one or other of the roots ربو *r-b-w* (growing up and upbringing), رعي *r-ʿ-y* (grazing and tending), ربع *r-b-ʿ* (containing the idea of "four-ness"), and شطر *sh-ṭ-r* (dividing in half). Although links with the meanings of all these roots can clearly be perceived to some extent in the conditions of the system

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sharecropping animals in his doctoral thesis of 1911 on sharecropping in Morocco, Algeria and Tunisia (Milliot 1911: 63 and 130-43). A short paper by Philippe Noël written just before the Second World War on sharecropping in northern Tunisia has a few pages on sharecropping animals (Noël 1938: 13-17). Both these studies will be reviewed below (Section 7.5).

[3] Cf. Milliot 1911: 63: "Les auteurs [du droit musulman] ne font jamais de la société pour l'élevage l'objet d'une étude spéciale."

[4] However, it is interesting that Louis Milliot (1911: 130) quite independently referred to the practice in North Africa as "*cherka fi-l-mawâchî*" (that is, *sharikah fī al-mawāshī* in the transliteration used in this present work) which he translates into French as "*société pour l'élevage*".

as it is practised in different areas (rearing and tending the animal and sharing by quarters or halves the produce, offspring and profit on sale), none of the usual lexical works, nor as far as can be seen any specialist Yemeni vocabulary list, records the terms with the same specific reference to sharecropping animals as they are employed in the Yemen at the present-day.[5] As is the case of sharecropping land the terms for sharecropping animals are predominantly on the Form III verbal noun pattern *mufā'alah*[6] or sometimes *fi'āl/fi'ālah* or *fa'āl/fa'ālah*,[7] though derivations of the verbal patterns *tafa''ala* and *tafā'ala* (verbal Forms V and VI) are also found.

In the Central Plateaux around Dhamār and Radā' at least, the most common and widely used names for the agreement are *ribā'* and *murāba'ah*. Either or both of these terms were found in Dhamār itself, at Afq (to the north of Dhamār), at al-Mayfa'ah (between Dhamār and Radā'), and around Radā'. A variant *ribā'ī* was heard at al-Kahaylah (near Radā'). In this region the sharecropper was once referred to as the *mutarābi'*.

In the Southern Mountains *ribā'* was heard also at al-'Udayn, but more common by far in this region (including at Dhī al-Sufāl, al-Qā'idah and al-'Udayn) was the term *shiṭār*, with the variants *shaṭar* and *mushāṭarah* also widespread. The sharecropper here was called *shaṭīr* and very occasionally (at al-'Udayn) *mutarābi'*.

In the central part of the plain of Tihāmah around al-Za'farān and al-Abyāt (southeast of al-Ḥudaydah) the system was universally referred to as *murābāh* and the sharecropper is called *murabbī*. However, a hundred kilometres to the south of al-Ḥudaydah at al-Suwayq (12 miles (20 km) west of Zabīd) the only term recorded was *mutarābi'* for the sharecropper, as heard sometimes also on the Central Plateaux.

In the Ṣan'ā' area no general pattern of usage was found during the field survey, no doubt partly because the practice of sharecropping animals in the vicinity of the capital is now more or less extinct and partly because of the linguistic influence of incomers from other areas.

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[5] Wehr does give *murābi'* (active participle of Form III verb from root ر ب ع *r-b-'*) as a partner in an agricultural enterprise who shares one quarter of the gains or losses, though sharecropping animals is not specified.

[6] Cf. *muzāra'ah*, etc.

[7] Cf. *sharākah*, *shirāḥah*.

In the village of Sanā' (some 6 miles (10 km) to the southwest of Ṣan'ā') the agreement was referred to as *rabā'* or *ribā'* and the sharecropper as *rabī*, but at Shibām (some 25 miles (40 km) to the northwest of the capital) the preferred term was *tira"ā* (for *tara"ā*) and the sharecropper was *mutara"ī*.

In addition to the above terms the terms *sharīk*, *ajīr* and *musta'jir* for the sharecropper in animals were also widely found, and the animal owner was everywhere referred to as *mālik al-māshiyah* or *ṣāḥib al-māshiyah*, or *mālik/ṣāḥib al-mawāshī*.

7.3 The Incidence of Sharecropping Animals in the Yemen

7.31 The Present Incidence and Rationale

During the present field survey some details of the practice of sharecropping animals were collected in all the areas visited. Respondents were generally agreed that its occurrence was more common *fī ayyām al-Imām* (in the time of the Imam) or *qabl al-thawrah* (before the republican revolution of 1962), or more generally *fī al-māḍī* (in the past), than it is now. In some areas indeed, and in particular in settlements close to Ṣan'ā' and other urban centres, the practice would seem to be virtually extinct, though even in these areas older respondents were able to provide particulars of how the system used to operate. Nevertheless, on the Central Plateaux (at al-Mayfa'ah, between Dhamār and Radā'), in the Southern Mountains (at al-'Udayn and Dhī al-Sufāl) and in Central Tihāmah (at al-Kimbāḥiyah to the southeast of al-Ḥudaydah, and al-Suwayq west of Zabīd) the present survey included respondents who were actively involved in animal sharecropping, either as owners or as sharecroppers, and there can be no doubt that the practice was still alive in the Yemen of the early 1990s, even if to a lesser extent than formerly.

The animals involved in the instances encountered during the field survey were always either cows or sheep/goats, though according to some respondents other domestic animals (donkeys, mules and camels) were said to be treated in the same way on occasions.[8] In one

[8] Although it was not mentioned by any respondent, there would seem to be no reason why hens and other domestic fowl could not be sharecropped also. One possible case of bees being sharecropped was recorded at al-'Udayn (in the Southern Mountains), though the case is unfortunately unclear in its details since the conver-

instance at al-Kimbāḥiyah (Central Tihāmah) the respondent at the time of the field survey was sharecropping five cows and seven sheep/goats, and in another case in the same locality another respondent had four cows and 15 sheep. In all other field cases the number of animals involved was generally only one or two, and it may well be that the plain of Tihāmah is exceptional in the extent to which animal sharecropping is still practised.

The system was generally described by respondents in the field survey on the following lines. One individual (called here the owner) decides to buy a young bull or bullock, a female calf, or a lamb or kid, and gives it to another individual (the sharecropper) to rear for him. The sharecropper provides fodder and shelter for the animal until it is fully grown and when it is sold he receives either a proportion of the sale price or else a proportion of the profit (that is, the difference between the buying price and the sale price). If the animal is female the sharecropper takes also a proportion of the offspring and benefits from the milk and milk products, either wholly or in part, after each birth. The owner receives similarly a proportion of the sale price and, in the case of a female animal, a share of the offspring and often also of the produce.

From the point of view of the owner, the advantage of the system is that he receives a return on the capital he originally invested in buying the animal in the first place (by receiving a share of its sale price and also, if it is a female, a share of the progeny and usually some of the milk products), but he remains free of the expense and inconvenience of rearing it. The sharecropper who bears the expense of rearing the animal also benefits from the sale of the animal and, if the animal is female, a share of the progeny and the milk products, without having usually to outlay an initial capital lump sum.

However, variations in this generalised pattern are common. Instances were noted at Mishrāfah in Wādī Rima' (Central Tihāmah piedmont) of sharecroppers having the choice of providing one-quarter of the buying price, in which case their share of the selling price was also one-quarter, though if they contributed nothing to the buying price they received no share of the price on sale. This system found at Mishrāfah in which the sharecropper may contribute to buying the animal may be more widespread in the Yemen than the

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sation in which it occurred had prematurely to be broken off. Interestingly, as will be seen in Section 7.51 below, both bees and domestic fowl are (or at least were once) sharecropped in northwest Africa (Milliot 1911: 131).

field information indicates, though generally speaking the most usual sharecropper of animals is, as might be expected, one who has little capital. This impression was somewhat substantiated by a relatively rich respondent in al-'Udayn (Southern Mountains) who, when he was asked whether he was a sharecropper in animals, said rather dismissively *al-shiṭār li-al-muwāṭinīn bi-dūn mazra'ah* (sharecropping animals is for people who don't have a farm).

7.32 Reasons for Recent Decline

Several respondents in the field survey were asked why the system of sharecropping animals was now less common than in the past. One reason given was *izdiyād al-mullāk* (the increase in owners), meaning that nowadays more people have greater wealth and can, if desired, afford their own animals, so that fewer people need to rely on tending other people's animals. Another respondent said: *al-ḥīn kill shakhṣ mālik* (nowadays everyone is an owner). Such answers tend also to support the common sense impression mentioned in the previous paragraph that sharecropping animals is and was carried out mainly by the poorer sections of the population without capital.

Another reason, given by the head of the government agricultural office for the governorate of Dhamār, was *kathrat al-'adad al-muhtarib min al-qurā* (the large number of people leaving the villages). Even though migration from rural to urban areas is undoubtedly a feature of the Yemen as other developing countries, the extent to which this is a valid reason for the decline in sharecropping animals is perhaps arguable since the country still has a very high rural population.[9] The real effect here may be indirect, since migration to towns often increases rural wealth through remittances when the links between urban workers and their home villages are maintained, as is generally the case in the Yemen.

But by far the most common explanation for the decline in animal sharecropping given by respondents in the present survey in all areas

[9] As was mentioned in Chapter 1 (Section 1.3 above), the latest population census for the northern part of the Yemen (the former YAR) available at the time of writing was that taken in 1986. Although another census was planned for the united Yemen in January 1994 (as announced in *The Yemen Times*, 8 January 1993, p.2), the published results have not become available to the present writer. However, the 1986 census projected that by 1990 some 79% of the population of the northern part of the country (8.86 million out of 11.28 million) would still be rural (Yemen Republic 1991: Table 2).

was that both fertiliser (*samad*) and dairy products—*samn* (butter) and *laban* (buttermilk)—are now freely available in local markets without the need to raise animals and to prepare the products domestically. As one respondent at al-Ahjur (Northern Mountains) put it, *al-ḥīn mish lāzim yi'allif, yiqaḍḍib, wa-ki-dhā—kill shī mutawaffir fī al-sūq* (nowadays it's not necessary to provide fodder and cut it and so on; everything's freely available in the market).

7.4 Analysis of the Systems of Sharecropping Animals in the Yemen

The proportions of the sale price and of the offspring and milk products which form the sharecropper's share, and also other details of the sharecropping agreement, vary not only from area to area but also from one contract to another within the same area. The most common systems however are by halves and quarters, a fact reflected in the widespread use of derivations from the roots *r-b-'* ("four-ness") and *sh-ṭ-r* (halving) to specify the system and the parties to it, as was pointed out above (Section 7.2).

7.41 Division of the Sale Price of the Original Animal

In the large majority of cases found in the field survey, when the animal came to be sold the sharecropper and the owner would share the profit (the difference between the purchase price and the sale price) between them equally, the owner recovering in addition the purchase price he had originally paid. Thus, to use the figures of a hypothetical example quoted by one respondent who tended several sharecropped animals, if a young bull were bought for YR 4,000 and sold several years later for YR 16,000, the profit of YR 12,000 would be shared equally between the owner and the sharecropper so that each party got YR 6,000, and the owner would take also the YR 4,000 he originally invested.[10]

However, many agreements differed from this general pattern. In the area of al-Suwayq (Central Tihāmah) one instance was recorded

[10] The figures in this example realistically reflected local prices in the middle of 1993 (when there were approximately YR 75 to the pound sterling on the free market), though at the time of writing (1998) prices would of course be considerably more as a result of the large inflation which the Yemen has undergone in the interim.

of the sharecropper taking as much as two-thirds of the profit (YR 8,000 to use the figures of the above example). On the Central Plateaux instances were noted in which the sharecropper received by contrast only one-quarter of the profit (YR 3,000), while at al-Ahjur (Northern Mountains) it seems to be usual for him to take none of the selling price at all. At Mishrāfah (Central Tihāmah piedmont) whether the sharecropper received a share of the profit depended on whether he contributed to the buying price, as has already been mentioned above (Section 7.3).

Other variations, which tend to raise the share due to the sharecropper, were also noted. In the case of female animals which were pregnant at the time of sale the sharecropper's share would be higher, the justification being that he has lost one of the offspring which would otherwise have been due to him had the pregnant animal not been sold. Similarly, his share would also be higher if a female animal is sold before it has given birth for the first time, since the sharecropper will not have benefitted at all from either offspring or milk or milk products. Such cases were recorded especially in Central Tihāmah. In one instance at al-Suwayq a quarter of the profit on sale would normally go to the sharecropper, though if the animal had never given birth he would take a quarter of the sale price, and so to use the figures in the above example, his share, normally YR 3,000 (i.e., one-quarter of the profit of YR 12,000), would rise to YR 4,000 (i.e., one-quarter of the sale price of YR 16,000).

In other cases, either the profit on sale or the total selling price would be divided not into halves or quarters but rather into a one-third share and a two-thirds share, and either of these shares could go to the owner or the sharecropper. This was so even in areas where the name of the practice is derived from the roots which imply halves and quarters (*sh-ṭ-r* and *r-b-ʿ*). In short, as many respondents in all areas replied, the proportion due to the sharecropper of the profit or of the sale price was *ḥasab al-ittifāq*, that is, it depended entirely on the details of the agreement, and these could vary considerably.

7.42 Division of the Produce

The general rule in most areas would seem to be that when a female animal (whether a cow or a sheep or goat) gives birth, all the *laban* (buttermilk) and either three-quarters or one-half of the *samn* (butter) are the sharecropper's, though in one case (at Ribāṭ ʿImrān, Central Plateaux) his share of the *samn* was recorded as two-thirds. In these

cases, the usual method of sharing the *samn* is for the owner to take it all every second, third or fourth week (depending on whether his share is respectively a half, a third or a quarter). However, in all cases noted in Central Tihāmah the sharecropper was able to take not only all the *laban* but all the *samn* also.

In addition, it is customary in some areas for the sharecropper to present the owner with a preparation made from the beest or beestings (that is, the colostrum, the first milk of a cow which has just given birth). This gift is called *libā'*[11] and was noted on the Central Plateaux around Dhamār, in the Southern Mountains at Dhī al-Sufāl and elsewhere, and on the Central Tihāmah around al-Suwayq. The *libā'* is specially prepared and the method of preparation was described as follows by a respondent at Dhī al-Sufāl. The beestings are mixed with an egg and *ḥabb sawdā'* (a kind of spice, perhaps that called "black sesame") and cooked until the mixture has thickened to form a cake. Another respondent, at al-Suwayq, said that in his area neither the egg nor the *ḥabb sawdā'* were added, but instead salt and pepper (*filfil*), and the milk was cooked in an *abar* (a kind of pot) until it had become thickened (*mujammad*) and formed a round flat cake (*qurṣ*). No doubt there are other regional variations in the *libā'* recipe. The giving of the *libā'* is not regarded apparently as part of the sharecropping contract strictly speaking but is said rather to depend on the goodwill of the sharecropper.

In addition to the *laban* and at least a share of the *samn*, the sharecropper is also entitled to all the manure from the animals he share crops. If the number of animals is large this can be a potentially very useful additional resource for him. Even if he has no land of his own and does not tenant someone else's, he can sell the manure to neighbours who do cultivate.

As far as other produce from the sharecropped animals is concerned, such as wool, hair and hides, little if any can be exploited by the sharecropper. Sheep and goats in the Yemen are raised primarily for their meat rather than the quality of their wool or hair, while the hides from them or from cows and bulls become the property of the butcher when they are sold for slaughter.

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[11] Cf. *libyah* and *libāy*, breast milk, quoted by Piamenta 1990-91 (entry root *l-b-y*), though Piamenta does not list *libā'* itself.

7.43 Division of the Offspring

As with the division of the *samn*, the offspring of female animals are most usually shared by halves or quarters, though several variations were noted in the field survey.

Probably the most common and most straightforward system, which is found to some extent in all areas, is for the owner and the sharecropper to halve the offspring between them. This is generally done by each party taking ownership of alternate animals at birth, the sharecropper most usually taking the first newborn. Sometimes however it is the value of each animal which is divided equally between the two parties rather than sole ownership of alternate animals, while in two recorded cases (one on the Central Plateaux and the other in Central Tihāmah) the system was that the value of the first born would be divided equally but that subsequent births would be shared alternately.

On the other hand, at al-Ahjur (Northern Mountains), around Dhamār (Central Plateaux) and at al-Kimbāḥiyah (Central Tihāmah) cases were recorded in which the sharecropper received only a quarter of the offspring or a quarter of their value, and in one instance on the Central Plateaux (at Ribāṭ 'Imrān), a sharecropper took every third birth in the case of sheep and goats but only every fourth birth in the case of cows.

Clearly therefore generalisations on how the offspring are shared for even the selected field settlements are practically impossible to make, given the limited extent of the field survey material and the way in which the findings vary from contract to contract. Certainly there is no simple formula which can be applied to the northern Yemen as a whole. On the other hand, sufficient evidence has been collected to show that sharecropping animals is still practised in the 1990s in the Yemen, and given the large literature on sharecropping land it is strange that the custom of sharecropping animals seems to have gone practically unremarked.

7.5 Comparison with Analogous Systems

Because of the silence of the Islamic jurists on the matter it is impossible to say what the official Islamic view of the practice of animal sharecropping might be. Presumably, if a question of its legality ever arose, then sharecropping land could be used as the *qiyās* (legal

analogy). Further, it would seem that modern field studies of the practice are rather rare, at least in Islamic countries, and comparisons of the Yemeni forms of the practice with those encountered elsewhere are consequently almost impossible to make. The sole references discovered which detail the practice are the studies referred to above in Section 7.1 by the French colonial administrators in northwest Africa in the first half of the twentieth century: Louis Milliot in 1911 whose work covers all three of the Maghrib countries (Morocco, Algeria and Tunisia); and Philippe Noël in 1938 who is concerned specifically with only northern Tunisia.[12]

7.51 Northwest Africa before the First World War, according to Milliot (1911)

Milliot's study of what he calls *la société pour l'élevage* as a translation for *cherka fi-l-mawâchî* (that is, *sharikah fī al-mawāshī* in the transliteration of this book) forms one chapter of his analysis of sharecropping contracts in the Maghrib countries, which, as has been remarked, seems to have been the first detailed study of sharecropping in the Islamic context carried out by a western lawyer. He notes that Islamic authorities are silent on sharecropping animals and he speculates that it may never have been an important enough practice to warrant their attention. Nevertheless, he says, the system does meet very real economic needs.[13] The strong impression is given indeed that the practice, at least in the early twentieth century, was not only widespread but thoroughly institutionalised in northwest Africa, and that, in the case of sheep, goats and cows at least, the numbers of animals subject to a contract would be much greater than is the situation in the Yemen at the present day.[14]

According to Milliot, any kind of domestic animal (except of course pigs), and in addition fowl and bees, can be the subject of sharecropping contracts in northwest Africa, and whether the contract is written down or not depends largely on the custom of the district.[15] Unless the animals are camels or horses, the sharecropper would not

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[12] Milliot 1911: 63 and 130-43; Noël 1938: 13-17.

[13] Milliot 1911: 130-31.

[14] Although Milliot nowhere gives any indication of typical numbers of animals involved in a contract he does mention constantly *troupeau.*

[15] *Ibid.*: 131-32. As will be discussed in the next chapter (Chapter 8, Section 8.31 below), whether sharecropping and other contracts in the Yemen are recorded in written form or are merely verbal is also largely geographically determined.

normally be allowed to use them as draught animals (Milliot presumably has cows or bulls in mind here rather than sheep or goats) without the permission of the owner, in which case the sharecropper would have to pay the owner a fixed rent for the use of their services.[16]

Milliot identifies two basic forms that the contract may take, depending on whether or not the sharecropper contributes to the capital outlay. Although a capital contribution from the sharecropper will alter the situation somewhat, and although, further, there are some regional variations, of which Milliot gives some details, the sharecropper would normally be entitled to the following share of the animal products:

- all the whey;
- all the cows' milk, though he must supply the animal owner with a quantity of butter proportional to the number of cows (the proportion being determined by custom);
- all the goats' milk;
- half the sheep's milk;
- all the manure.[17]

In addition, the sharecropper will benefit from a share of the offspring and of the profit on sale, though the size of these shares is variable.[18] However, normally a sharecropper can expect gradually to build up a herd or flock of his own.[19]

7.52 Northern Tunisia in the 1930s, according to Noël (1938)

Noël's account of sharecropping animals in northern Tunisia is much shorter than Milliot's, but in the details of how the produce is shared between the two parties and other practical aspects it is at least as revealing. As with Milliot's account, the strong impression is given that the practice of sharecropping animals was much more standardised, and perhaps more institutionalised even, in northern Tunisia just before the Second World War than it is in the Yemen today.

Noël provides no Arabic term for the practice, which he calls simply *métayage d'élevage* (literally, sharecropping of rearing). From the information that he does give however, it would seem that there

[16] *Ibid.*: 135-36.
[17] *Ibid.*: 134.
[18] *Ibid.*: 137.
[19] *Ibid.*: 140.

existed professional herdsmen in northern Tunisia who earned their livelihood from tending flocks and herds on a sharecropping basis: Noël calls them "*une caste de spécialistes respectés*".[20] Such a situation is different from that recorded in the present field survey in the Yemen where, as has been mentioned earlier in this current chapter, sharecropping animals is apparently carried out on a smaller scale by individuals who will probably also be farmers rather than specialist herdsmen.[21] A further difference from the situation in the Yemen is that in northern Tunisia there was in the herdsman's wage both a fixed monetary element and a fixed quantity of produce per head of the flock or herd, and this could be said to dilute, so to speak, the sharecropping nature of the contract.[22]

Concerning the details of the sharing systems, Noël distinguishes between the system for cattle and that for sheep and goats. For tending herds of cattle, the sharecropping herdsman would receive the following:

- 10 Francs per head per year;
- 1 *waybah* of "*merlout*" per head per year;[23]
- half a cow hide per herd per year;
- the milk from the herd;
- "a large share" from the sales of the butter.

The first three elements are thus fixed elements of the wage, while only the last two elements belong to a truly sharecropping system. The size of the share of the proceeds from the butter sales is not specified: Noël simply says "*une participation importante*". It will be noted that, in contrast to the Yemeni situation, the northern Tunisian share-

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[20] Noël 1938: 14.

[21] If there exists in the Yemen what could be called a class of professional herdsmen who earn their living by tending flocks and herds on a specifically sharecropping basis, as opposed to a fixed wage, they were not met with during the present field survey.

[22] *Ibid.*: 14. Milliot in contrast does not mention such an arrangement which includes a fixed element.

[23] A *waybah* (recorded by Noël as "*ouiba*") is a well documented Islamic unit of capacity. W. Hinz (1955: 52) gives its size in mediaeval Tunis as approximately 12.6 litres, though the present writer has been unable to determine its size in 1938. "*Merlout*" is presumably some sort of food commodity, the term possibly deriving from an Arabic word (Noël encloses the word in quotation marks), though its identification remains elusive. Because it is measured by capacity it may well be some kind of grain (possibly wheat or cracked wheat?).

cropping cattle-herdsman had no right to any part of the sale price when the cattle are sold nor to the ownership of any of the offspring.

For sheep and goats the wage accruing to the sharecropping shepherd or goatherd was larger, and this was justified, so Noël says, by the greater attention that a flock of sheep or a herd of goats requires compared with a herd of cattle. It would also include a share of the offspring. The shepherd of a flock or the goatherd of a herd would earn the following:

- 1 Franc per head per year;
- 1 *waybah* of "*merlout*" per 10 adult animals per year;[24]
- half a cow hide per herd per year;
- 1 lamb or kid per 10 births per year;
- the milk from the flock;
- a share from the sales of the butter.

So here, the first three elements are fixed elements, while the last three are sharecropping proper. The inclusion of a share of the offspring in the herdsman's wage is significant, though at one-tenth of the births it is very much smaller proportion than the kind of share in the offspring taken by animal sharecroppers in the Yemen (usually one-half, sometimes one-quarter). On the other hand, because of the apparently larger number of animals tended at one time in the Tunisian system, one-tenth of the offspring would no doubt produce a sizeable absolute number very rapidly, and indeed Noël says that by such appropriation sharecropping herdsmen can often quickly become owners of flocks in their own right.[25] Concerning the butter sales, Noël again does not specify the size of the herdsman's share.

Somewhat amusingly, Noël ends his account of the practice in northern Tunisia with a few paragraphs of practical advice on how to choose a good herdsman-sharecropper: he will be shod in esparto grass sandals (which will be a sign of frugality); he will have yellow teeth (since chewing tobacco will enable him to withstand the worst gale); and his crook will be well polished (a sign of constant use).

[24] For *waybah* and "*merlout*", see the previous note.
[25] Noël 1938: 15.

7.6 Brief Excursus: "Transport Sharecropping"

There is one additional point of interest in Noël's article. He describes, albeit briefly, a further kind of sharecropping in northern Tunisia to which the present author has never found any reference elsewhere. It is what Noël calls *métayage de charrois*, which might be translated, albeit somewhat inelegantly, as "carting sharecropping" or "transport sharecropping".[26] There are three "inputs" which are considered: first, the labour; second, the mule and its fodder; and third, the cart, the harness and their maintenance. The provision of one of these elements entitles the provider to one-third of whatever is produced from the transport of the goods. Thus, someone who owns a mule and a cart with its accoutrements (that is to say, two of the inputs) could hire a labourer to transport some goods. Whatever profit results from the exercise is then shared, the mule and cart owner receiving two-thirds and the labourer one-third. Noël points out that it is possible for three parties to be involved, each providing one of the three inputs and benefiting from one-third of the proceeds.

7.7 Concluding Remarks on Sharecropping Animals

The point has been made in this chapter that the rationale behind sharecropping animals is the same in principle as that behind sharecropping land: both involve the transfer of a piece of property from its owner to a sharecropper, with each party benefiting from shares in the product. It has also been demonstrated that sharecropping animals in the Yemen shows great variation in the way in which contracts are set up and how large is each party's share of the product, just as contracts for sharecropping land vary in the same respect, and these variations are paralleled by a large range of regional terms used to name the practice.

It is unfortunate that little can be said about how general are the features of the practice as found in the Yemen or how specific they might be to the Yemen. The reason, remarked on more than once in the chapter, is the apparent rarity of comparative detailed studies on sharecropping animals from other countries. The two available to the present writer, which are both from formerly French colonial North

[26] *Ibid.*: 13.

Africa, have been discussed in Section 7.5 above, and points of apparent contrast with the Yemeni situation have been made. These are, notably, that, according to Noël's account at least, the North African systems were only partly sharecropping properly speaking (in that fixed wage elements were also present), and that they would appear to have been more standardised and institutionalised, and also to involve larger numbers of animals at a time, than would appear to be currently the case in the Yemen.

Even more reticent on the subject are the Islamic lawyers. Accordingly, it is difficult to make any statement on the conditions required by a contract to sharecrop animals to make it valid under Islamic law. Presumably, any legal problem or dispute would in practice be resolved on the basis of *qiyās* (legal analogy) with sharecropping land, though this is conjecture.

Why Islamic *fiqh* is so silent on the subject can also only be guessed at. As was mentioned in Section 7.51 above, Milliot speculated that it may never have been an important enough practice to warrant the attention of Islamic lawyers. This may well be true, at least in part. But might it also be that Islamic lawyers have never recognised the practice as significant just because it is not mentioned by any *ḥadīth*? Whether this is so or not, the lack of *ḥadīth*s on sharecropping animals does certainly suggest either that the practice was unknown in the Ḥijāz at the time of the Prophet (though there would seem to be no good reason to suppose this), or else that it never caused any serious offence to religious sensibilities of the early Muslims, despite its similarity to sharecropping land, which of course was legally problematic, as was discussed in Part I of this book. At any event, the practice produced no disputes which the Prophet was asked to resolve, according to the *ḥadīth*s as they have come down to us.

The subject of incidence of disputes between the parties in sharecropping contracts, together with the contractual context of duties and responsibilities, is the subject of the next chapter, and it will be indicated there, *inter alia*, that disputes in land sharecropping at least are probably less frequent in practice than the writers of *fiqh* might lead one to expect.

CHAPTER EIGHT

SHARECROPPING CONTRACTS AND CONTENTIONS IN THE YEMENI CONTEXT

المالك ما يسوّي أي شي، يجلس مرتاح على كرسيه وياخذ حصته في اواخر السنة

"The owner doesn't do anything at all; he just reclines content on his couch and takes his share at the end of the year."
Words of a Yemeni sharecropper at al-Waqash, above Jiblah.

الخدمات ان يزرع الارض ويصلّح – يعني على اساس ان يستفيد المالك والشريك

"The services [the sharecropper] does in cultivating the land and keeping things in repair—well, it's because both the landowner and the sharecropper benefit."
Words of a Yemeni sharecropper at Sanā', SW of Ṣan'ā'.

8.1 INTRODUCTORY REMARKS

This chapter will bring together some at present rather widely dispersed information, both published and unpublished, to provide a picture of some aspects of the contractual relationship between the Yemeni landowner and sharecropper and to examine the problems and contentions (or disputes) that may arise from this relationship. In Section 8.2 some preliminary reflections are made on the landlord-sharecropper relationship in the Yemen, with emphasis on the tenant's duties and how the seed and other agricultural inputs are to be supplied. Section 8.3 then examines some examples of Yemeni sharecropping contracts. In Section 8.4 the available evidence on sharecropping contentions and pleas is analysed, and then finally Section 8.5 discusses the six examples of sharecropping *fatwā*s found in an unpublished collection of Yemeni *fatwā*s dating from around 1000/1600.

8.2 LANDLORD AND SHARECROPPER: THE VIEW FROM THE FIELD

8.21 Duties and Services required of the Tenant

From the point of view of the landowner the primary duty of the tenant is to hand over to him at the end of the harvest the agreed share of the harvest. In order to do this the tenant is required in the case of grains and other sown crops to prepare and plough the soil and sow and harvest the crop, and in the case of perennial crops such as fruit trees and *qāt* to keep the orchards weed-free and apply fertiliser to the trees and to gather the harvest. He is also responsible for regular irrigation of the crop unless of course the only water source is rainfall. The labour for these tasks is provided by himself and often also by members of his family, and is sometimes supplemented by paid labour which he contracts.

Many respondents in the field survey specified other duties, though all can be construed as specific tasks within the above general responsibilities. In some regions where fields are large, in particular on the plain of Tihāmah and the high plateaux, the tenant may be responsible for the cost of hiring a plough and one or two animals (bullocks, donkeys, mules, or occasionally a camel) to pull it if he does not own them himself, or else a tractor (*ḥarrāthah*) in areas where such is available. Elsewhere, in mountain areas where terraced plots are too small for ploughing, tilling and also other earth-moving work such as embanking water channels is done by spade (*kurayk*[1]), shovel-scoop (*mijrafah* or *migrafah*[2]) and a kind of hooked digging pick (*ḥijnah* or *ḥignah*[3]).

Where payment of the rent is to be in cash (*naqdᵉᵉⁿ*) rather than in kind (*'aynᵉᵉⁿ*), the tenant may also be responsible for the costs of marketing the produce. Sharecroppers who pay in kind are generally expected to bear the cost of delivery to the landowner.

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[1] From the Turkish *körek*, shovel.

[2] Cf. Varisco (1982: 333) who records it as *majrafī* (in al-Ahjur).

[3] Cf. Serjeant (1988: 150) who quotes the term as a mattock used to dig wells in the Faḍlī Sultanate, South Yemen. In the Ibb area (at least) the use of the *ḥijnah/ḥignah* is by no means confined to digging wells but is used much more generally in agricultural tasks which involve moving soil, such as in forming the *aḥājīn* (to be mentioned again below) around the bases of palm-trees. Cf. Piamenta (1990-91: 85a) who gives the Yemeni verb *ḥagan, yiḥgin* as meaning to hoe.

In the case of date-palms, the tenant will be also responsible for the *talqīḥ*, the pollinating, which will ordinarily involve *masḥ* (stroking the female flowers with the male spadix (*liqāḥ*) of the date-palm).[4]

Frequently mentioned also among the duties of the tenant is *taṣlīḥ al-ḥudūd* and *taṣlīḥ al-judrān* (the physical repair of the boundary walls and the terrace walls) and also *ḥifẓ al-ḥudūd* (the maintenance of the farm boundaries both in their physical fabric and against encroachment by neighbouring landowners). In irrigated areas the tenant also has the duty to clean out and keep in good repair the water channels[5] and the cisterns,[6] and also the *aḥājīn*, the circular banked depressions around the bases of date-palms which retain irrigation water. This last term (*aḥājīn*) was never heard in the field but it exists in certain Arabic legal sources.[7] In addition, and especially in *qāt* and fruit tree plantations, it is also the tenant's duty to protect the crop from night robbers, either by acting himself as watchman (*ḥāris*) or by employing one, for which purpose are the many two-storey towers which dot the *qāt* plantations of the mountain areas. In some regions, especially where the crop is dates, the tenant will be expected also to protect the fruit from scavenging birds and other animals.[8]

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[4] The term *talqīḥ* is the standard Arabic word for pollination (cf. *liqāḥ*, the male spadix), while *masḥ* (lit. wiping or stroking) is widely used for artificial pollination.

[5] There are several words for water channel or irrigation channel in use in the Yemen. As well as *ghayl* (pl. *ghuyūl*) and *sayl* (pl. *suyūl*) for specific types of watercourse, the following are all common for artificially dug channels: *majrī* (pl. *majārī*); *masqā* (pl. *masāqī*); *sāqiyah* (pl. *sawāqī*); *sharīj* (pl. *shirwaj*); and often *nahr* (lit. river, pl. *anhār*). The bed of a *wādī* is often referred to as the *sā'ilah*.

[6] Probably the three most common words for cistern or reservoir in the Yemen are: *mājil* (pl. *mawājil*); *ṣihrīj* (pl. *ṣahārīj*); and *ḥawḍ* (pl. *aḥwāḍ*).

[7] The term *aḥājīn* may well be a specifically Yemeni word since it does not appear in the usual lexical sources. The term is obviously connected with the digging tool *ḥijnah* cited in the text above. As was mentioned in Chapter 4 (Section 4.32 above), *aḥājīn* is found in al-Nawawī *Minhāj al-Ṭālibīn* (148, where it has been wrongly edited by Van Den Berg as *ajājīn* and is somewhat misleadingly translated into French as *réservoirs*). It is also found in two texts to be studied later in this chapter: the Ḥaḍramī sharecropping contracts in Section 8.33; and in Section 8.5 the Ibn Ja'mān *Fatwās* ($179b_{20\text{-}21}$ and $180a_5$ where the author of the Ms. adds a clear gloss on the term as الحفـــر حـــول النخـــل *al-ḥafr ḥawl al-nakhl*, the depression around the base of the date-palm, which must dispel any doubt as to its meaning).

[8] In Ḥaḍramawt Serjeant has reported that a basket cover called a *khubrah* is placed over ripening dates to protect them from the depredations of birds, insects and animals (1967: 62 n.110). The present writer noted that ripening dates in Tihāmah are protected in a similar way by being covered with sacking or other cloth, though

All these duties were mentioned by respondents in the present field survey. One respondent (in Qābil Wādī Ẓahr, to the north of Ṣan'ā') summarised them as عمل الزراعة من كل الجوانب *'amal al-zirā'ah min kull al-jawānib* (the work of cultivating in all respects). It is rare for a landowner to extend to the tenant any help in them. As another respondent (at al-Waqash above Jiblah) put it, المالك ما يسوّي أي شي، يجلس مرتاح على كرسيه وياخذ حصته في اواخر السنة *al-mālik ma yisawwī ayy shay, yaglis murtāḥ 'alā kursī-h, wa-yākhudh ḥiṣṣat-ah fī awākhir al-sanah* (the owner doesn't do anything at all; he just reclines content on his couch and takes his share at the end of the year), a statement which may illustrate a certain degree of dissatisfaction with contractual arrangements felt by some tenants.

On the other hand, such discontent may only be a minority feeling. Many Yemenis involved in sharecropping experience the practice from both sides, so to speak, since they are both landowners and sharecroppers, as was noted in Chapter 7 (Section 7.41), and they must as a result have a first-hand awareness of the requirements and difficulties of both standpoints. Moreover, as was pointed out in a more general context in Chapter 2 (Section 2.24) many of the contractual conditions, such as keeping the terrace walls and water channels in good repair, and irrigating the crops and protecting them from robbers, are in the interests as much of the tenant as the landowner since the size of the income of both parties depends on the size of the harvest. This was acknowledged by many respondents. As one respondent (in the village of Sanā', to the southwest of Ṣan'ā') put it, الخدمات ان يزرع الارض ويصلّح - يعني على اساس ان يستفيد المالك والشريك *al-khidmāt an yizra' al-arḍ wa-yiṣalliḥ—ya'nī, 'alā al-asās an yastafīd al-mālik wa-al-sharīk* (the services [the sharecropper does] in cultivating the land and keeping things in repair—well, it's because both the landowner and the sharecropper benefit).

The extent to which it is usual for the sharecropper to deposit with the landowner a *shaqīyah* (a guaranty which is necessary before he can

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unfortunately no further details of the practice, terminological or otherwise, were collected.

begin working land on which there are perennial crops but which is returnable when he vacates the land) was not investigated in detail during the survey. In her study of Wādī Ẓahr M.W. Mundy shows that the practice existed in her field study area in the 1970s for certain land but owing to the greater cash income from the increase in *qāt* growing both the payment of *shaqīyah* and indeed the practice of sharecropping itself had become less extensive than previously.[9] Wādī Ẓahr, because of its proximity to Ṣan'ā' (it lies only some 7½ miles (12 km) north of the capital), may however be atypical in this, though to what degree it is impossible to estimate without more field research.

It is also very difficult to say how widespread or onerous on Yemeni sharecroppers are extra-contractual duties and services such as A.K.S. Lambton found in Iran,[10] E. Pratt in Italy[11] and other researchers elsewhere, as was discussed in Chapter 2 (Section 2.23). The reason for this is that the exact perimeter of the terms of the contract is difficult to determine. As will be seen below in Section 8.32 when three modern contracts from al-'Udayn are examined, even a "service" such as giving the landowner "gifts" of the crop over and above his proper share when he visits the farm, which is normally taken to be extra-contractual elsewhere, is specifically mentioned within one of the al-'Udayn contracts as part of the agreement. The difficulty of deciding what is contractual and what is extra-contractual is increased by the appearance in contracts, such as those of al-'Udayn, of catch-all requirements such as that the sharecropper is expected to do everything which is required of him *sālif al-balad* (according to the precedence of the place) or *ḥasab al-'urf* (according to custom). If it is the custom of the village that sharecroppers provide their landlords with extra gifts or carry out services additional to the work involved in producing a crop, such as building work or road improvement, then these can presumably be deemed to be part of the contract and a sharecropper would have no grounds for complaint by claiming that having to provide such services lay outwith the contract. This would seem to be so despite the fact that Islamic jurisprudents, including the Zaydī Ibn al-Murtaḍā[12] and the Shāfi'ī al-Nawawī,[13] have ruled

[9] Mundy 1981: 62-64.
[10] Lambton 1969: 330.
[11] Pratt 1994: 41.
[12] Ibn al-Murtaḍā *al-Baḥr al-Ẕakhkhār*: V, 67_{2-4}; see Chapter 5 (Section 5.2) above.
[13] Al-Nawawī *Minhāj al-Ṭālibīn*: II, 148_{4-5}; see Chapter 4 (Section 4.32) above.

against the sharecropper having to provide services that are not directly part of the crop-producing process.

8.22 Supply of Seed, Fertiliser and Other Agricultural Inputs

In most instances recorded in the field survey both seed and fertiliser and all costs of tilling and harvesting were supplied by the tenant, though in many cases this can be done at little monetary cost to him since seed is generally kept back from the previous harvest while manure is often available from his own animals or those of his neighbours. Chemical fertiliser (*samad kīmāwī*) is used, but to a lesser extent than animal manure (*samad baladī*), especially in areas distant from towns. In the case of rain-fed land fertiliser of any kind is seldom applied, except from the animals grazing the stubble.

Only in a minority of cases (approximately 20%) were either the seed or the fertiliser or both supplied by the landowner, though the practice varies from contract to contract and some special and complex arrangements were noted. Consequently generalisations are difficult to make, though it seems clear that whether a landowner contributes depends on the custom of the area, since in many of the areas visited no instance of contribution by landowners was found while in other areas the custom by which the landowner contributed seemed relatively common. In one case (at Najr, south of 'Amrān) the landowner supplied one-third of the cost of the fertiliser and one-third of the cost of the harvesting if he took his share of the sorghum before it had ripened to be used as fodder, though otherwise the tenant provided all inputs. In another case (also at Najr) the landowner paid the cost of the seed (but not the fertiliser) in proportion to his share of the harvest (in this case one-half), and a similar arrangement was noted in the Hamdān area to the northwest of Ṣan'ā'. Other cases in the area of al-Suwayq (to the west of Zabīd in Central Tihāmah) indicated considerable flexibility in whether the landowner supplied anything but the land: whether he contributed to other expenses or not depended entirely on what was agreed by the parties to the contract. In two cases at al-Suwayq the landowner's share of the crop was the same as his share of the cost of the seeds and fertiliser, and this share varied with the type of crop. In another case at al-Suwayq the costs of the inputs for vegetables were shared between the sharecropper and the owner of the water pump, and if the landowner decided to help in supplying fertiliser he would take one-quarter of the crop but if not then his share would be only one-sixth.

Generally speaking however, in most areas the response was that كل المصاريف من عند المستأجر *kull al-maṣārīf min ʿind al-mustaʾjir*, or كل التكاليف على الشريك *kull al-takālīf ʿalā al-sharīk* (all the costs are on the tenant/sharecropper), or else المالك ما يدفع شي *al-mālik mā yadfaʿ shay* (the landowner doesn't pay for/hand over anything). This was so even if the tenant paid only indirectly. One landowner at al-Qāʿidah (between Ibb and Taʿizz), for example, reported that he supplied seed potatoes to his sharecroppers from his own pocket, but further ques-questioning revealed that he recouped the cost من راس المحصول *min rās al-maḥṣūl* (from the harvested crop before it is shared out between him and his tenants), an arrangement which was subsequently confirmed in an interview with one of his sharecroppers. In most other instances where the landowner paid initially for the seed and the fertiliser it was found that he was recompensed by a larger share of the harvest than he might otherwise receive. This was the case with a landowner interviewed at al-Mukaymanīyah (south east of al-Ḥudaydah on the coastal plain of Tihāmah) who provided all agricultural inputs for his sharecropper (seed, fertiliser, and also the hire of ploughs and the costs of harvesting and marketing the produce) but took four-fifths of the harvest, which, as has been seen in Chapter 6 (Section 6.41) above, is a large proportion. High proportions of the harvest were also taken by landowners at Mishrāfah (just above the point at which Wādī Rimaʿ debouches onto the plain of Tihāmah), though here again they supplied all agricultural inputs (including ploughing, harvesting and marketing) to their sharecroppers.

In general therefore it would seem that in most regions in northern Yemen it is the tenants who supply all agricultural inputs but that in certain areas (including the Northern Plateaux and parts of Central Tihāmah) it is common for the landowner to provide them, either wholly or in part, in which case the landowner's recompense is larger than it would otherwise be.

8.3 SHARECROPPING CONTRACTS

8.31 Written and Oral Contracts

In theory, any contract may be recorded as a written document, though in Islamic law a verbal agreement between two legally competent parties in the hearing of two witnesses is sufficient for the contract to be binding and in fact takes precedence over any written evidence. It has already been observed in Chapters 4 and 5 above that Islamic jurisprudents often give the proper form of words which will conclude a contract. Thus for example, as was shown (Chapter 5, Section 5.2 above), Ibn al-Murtaḍā states that to make a *mughārasah* contract the following forms of words are valid:

> The form [of words to make a *mughārasah* contract is for the landowner to say:] "*Ghārastu-ka*" (I engage you as a *mughārasah* tenant); or: "*ʿĀmaltu-ka*" (I make a deal with you [under a *mughārasah* contract]); or "*Ighris hādhihi*" (Plant this [piece of land under the terms of the *mughārasah*]). It is on this [basis] with the agreement [of the engaged party] [that a *mughārasah* contract would be valid], or some [wording] to the same effect.[14]

For the *musāqāh*, Ibn al-Murtaḍā says the following:

> [The correct form to make] a verbal *musāqāh* contract is [for the landowner] to say: "*Sāqaytu-ka ʿalā hādhā al-nakhīl muddaʿ ka-dhā*" (I engage you in a *musāqāh* contract over these date-palms for such-and-such a period), or words to the same effect such as "*Taʿahhad lī hādhihi al-ashjār bi-al-saqy wa-al-iṣlāh muddaʿ ka-dhā*" (Tend these trees for me by watering and maintaining them for such-and-such a period).[15]

Similarly, it was indicated in Chapter 4 (Section 4.32) that al-Nawawī also included forms of words to make a *musāqāh* contract. In fact, they are very similar to those of Ibn al-Murtaḍā:

> The correct form [of words to make a *musāqāh* contract] is [for the landowner to say]: "*Sāqaytu-ka ʿalā hādhā al-nakhl bi-ka-dhā*" (I engage you in a *musāqāh* contract over these date-palms in such-and-such a way); or else: "*Sallamtu-hu ilay-ka li–tataʿahhada-hu*" (I hand [the date-palms] over to you so that you might take care of them). Then [the *ʿāmil*] has to show his acceptance, without all the details of the work

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[14] Ibn al-Murtaḍā, *al-Baḥr al-Zakhkhār*: V, 67_{7-8}.
[15] *Ibid.*: V, 69_{5-6}.

> involved [having necessarily been named]. What is not specified in any respect is to be referred to *al-'urf al-ghālib* (the dominant custom).[16]

These examples—both the Zaydī and the Shāfi'ī—show that the emphasis is on verbal form: that is to say, the actual words spoken, and these need constitute only a brief sentence. If the correct words are spoken in a valid situation (where there are two witnesses, where both parties are of sound mind, and so on) then the contract will be binding. There is no stipulation that the contract be written down, nor even that all the conditions of the contract be verbally rehearsed.

In the Yemen, whether the contract between landowner and tenant is committed to writing depends very much on the custom of the area. In the Northern and Central Plateaux and in Tihāmah written land tenancy contracts are exceptional. The usual contract in these regions is verbal and *bi-al-amānah* or *bi-al-thiqah* (on trust) before two witnesses. Contracts were said to be written in these regions only under certain circumstances. One respondent at Ribāṭ 'Imrān (between Yarīm and Dhamār) said that contracts in his area were sometimes written in the case of *qāt* and fruit trees because *al-maḥṣūl qawī* (lit. the yield is strong, meaning that the harvest from such crops is worth a lot of money) but not in the case of grains. According to another respondent at al-Mayfa'ah (between Dhamār and Radā') contracts were only written where the tenant was from outside the village and unknown personally to the landowner. A further respondent at al-Kahaylah (just to the south of Radā') said the contract could be written if both parties wanted it written, but that this was rarely done since there were never any disputes between landowner and tenant in his area. If contracts are recorded in writing in these regions, then according to respondents in the present field survey anyone (*ayy wāḥid*) who can write can do the recording, and not necessarily a local government official, a shaykh or a *qāḍī*.

In the mountain regions (Northern Mountains and Southern Mountains) on the other hand, all respondents indicated that land tenancy contracts were always written, signed by two witnesses and registered by a local or regional government appointed recorder who would be the *amīn al-maḥall* or *ma'mūn al-'uzlah* (the "secretary" or "recorder" of the village or *'uzlah*) or the *ḥākim al-nāḥiyah* or *nā'ib al-ḥākim* (the *qāḍī* of the *nāḥiyah* or his deputy) who would provide it with an official stamp (*khātam*). One copy of the agreement would be

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[16] Al-Nawawī *Minhāj al-Ṭālibīn*: II, 147_{2-5}.

given to each of the contracting parties and generally a copy would be retained by the recorder. Three examples of such contracts (from al-'Udayn, in the Southern Mountains west of Ibb) will be considered in Section 8.33 below. First, however, the following subsection will examine an example of what might be called ideal or theoretical "proformas" for the three main kinds of sharecropping contracts against which it will be possible to compare the al-'Udayn examples.

8.32 Three Contract Formats from Ḥaḍramawt

In a lengthy paper on irrigation in Ḥaḍramawt R.B. Serjeant quotes the text of three sharecropping contracts from a late nineteenth century Shāfi'ī document from Ḥaḍramawt which for convenience may be called the Bā Sawdān Ms.[17] The three contracts are respectively for *musāqāh*, *mughārasah* (though different terms are used here for *mughārasah* as will be seen) and *muzāra'ah*. They are evidently what might be called models or proformas, with words such as *Fulān* (So-and-so) and *ka-dhā* (such-and-such) in places where names and other information would be inserted. The text has been included in Appendix 3 below, and the following is the present writer's translation.

(1) Form for the *Musāqāh*

[The Shaykh] writes: Praise be to God.
So-and-so has engaged So-and-so in a *musāqāh* contract over stated date-palms in such-and-such a way, according to the legitimate rules of the *musāqāh*, for a period of one complete year, starting in such-and-such a month, for a share of half the fruit. [The tenant] will be responsible for tending the stated date-palms and pollinating them, and cleaning out the water channels serving them,[18] maintaining the *aḥājīn* (the irrigation hollows round the base of the date-palm trunks),[19]

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[17] The title of the document is تحصيل المقصود فيما طُلب من تعريف العقود *Taḥṣil al-maqṣūd fī-mā ṭuliba min ta'rīf al-'uqūd*, composed in 1315/1897. The paper of Serjeant's referred to here is Serjeant 1964 and the contracts are quoted on pp. 61-62 of it. The present writer has not examined the original document and is reliant on Serjeant's published extract.

[18] The Arabic reads تنقية نهره *tanqiyat nahr-hi*. Serjeant glosses this as "clean-[ing] the trunks", which must be a mistake. *Nahr* (lit. river) is a common enough term for irrigation channel whether natural or artificial.

[19] The term *aḥājīn* has already been discussed above (Section 8.21 and note 5). In Serjeant's text it has been wrongly transcribed *ajājīn*.

removing grass [and weeds], and guarding, harvesting and drying the fruit. [The tenant] may do all this either by himself or by delegating someone to do it.

(2) Form for the *Mukhābarah* and *Mufākhadhah*[20]

[Explanatory preamble:] This is also called the *munāṣabah*. It occurs when [the landowner] hands over the piece of land to someone who will plant it with trees. The trees may be shared between the two parties equally or unequally.

[The Shaykh] writes: Praise be to God.

So-and-so and So-and-so have agreed that So-and-so[21] should plant a certain area, or the land belonging to So-and-so, and then he should specify the number[22] of the kind of date-palms he wishes to plant. The young date-palms and the [agricultural] equipment will be the responsibility of the tenant[23] and also he must irrigate and rear [the palms] until they mature,[24] according to the custom (*'urf*) of the district.

This [constitutes what is known as] *fakhdh al-nisf aw 'alā al-munāṣafah* (sharecropping by halves according to the *mufākhadhah*—i.e., the *mughārasah*) on the basis of which the two [parties] enter into a *mukhābarah* and *mufākhadhah* agreement legitimately drawn up.

[The contract should end:] This is dated such-and-such a day, such-and-such a year.

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[20] It is clear from what follows that this format concerns the *mughārasah* contract. The terms *mufākhadhah* and *munāṣabah* are noted also by the author of the Bā Kathīr Ms. who says they both mean *mughārasah* (Bā Kathīr Ms.: $11_{11\text{-}14}$ and 11_{20}-12_1). See also these three entries in Appendix 1 below.

[21] Presumably the same as the second of the names just given.

[22] The term *ḥufrah* (pl. *ḥufar*) is a Yemeni counting term—cf. the Omani *qōrah* for counting trees and large plants. For Omani counting terms with some reference to the Yemen see Donaldson 1994.

[23] The term used here for tenant is *fakhīdh*, deriving obviously from *fakhdh* and *mufākhadhah*.

[24] The wording of this passage in the text is: وعلى الفخيذ المقالع والمؤن والسقي والتنمية الى التعتيق *wa-'alā al-fakhīdh al-maqāli' wa-al-mu'an wa-al-saqy wa-al-tanmīyah ilā al-ta'tīq*, which Serjeant glosses as "*Inter alia* the working partner has to deal with the young palms (*maqla'*), irrigate them, and rear them up to the *ta'tīq*". He says that the term *ta'tīq* is unknown to him and he makes no suggestion for its meaning, but it would seem clear to the present author that, given the root and the context, it must mean maturity—that is to say, the date-palms must be looked after until the time they are mature enough to bear fruit. The term *mu'an* Serjeant says means "gear", according to a Ḥaḍramī informant (Serjeant 1964: 62). Such gear would presumably include tools for digging, pruning, pollinating and so on, and materials for covering ripening fruit to protect it from pests.

(3) Form for the *Muzāra'ah* and the *Mukhābarah* on land for someone [else] to sow/cultivate it

[The Shaykh] writes: Praise be to God.
So-and-so has said to So-and-so: "*Zāra'tu-ka* (I have engaged you in a *muzāra'ah* contract) on such-and-such a plot of land—and [the owner] should here describe it—in order for you to sow it. I shall have the responsibility of supplying the seed-corn, and you will be responsible for [giving me] half the produce [from the land]".
Alternatively, [the landowner could say]: "*Āmaltu-ka* (I have engaged you in a contract) on such-and-such a plot of land. You will be responsible for providing the seed-corn and you will get half the produce [of the land], under the terms of a *mukhābarah* or *muzāra'ah* contract clearly and legitimately set up and incorporating the conditions necessary to make it comply with correct legal form".
This is dated such-and-such a day, such-and-such a year.

Superficially these three model contracts may appear very similar. In all three the name of each party is to be specified, the plot of land is to be delimited, and a half share of the produce for each party is mentioned (though it is more than likely that this proportion is given only as an example and would in practice vary, if only because of the fact that the provision of the seed or plants can vary widely both between and within the contracts). On closer examination however, and with the benefit of background information such as has been put forward already in this book, certain significant differences between them can be identified.

First, there is probably an implied difference in the relationship between the two parties in the different contracts which is reflected in the wording. In the first (*musāqāh*) and third (*muzāra'ah*) contracts the landowner is clearly the party who is taking the initiative while the tenant can perhaps be understood as being in a more subservient role: the wording of the relevant passages is قد ساقى فلانٌ فلاناً *qad sāqā fulān*^{un} *fulān*^{an} in the first; and قد قال فلانٌ لفلان زارعتُك *qad qāla fulān*^{un} *li-fulān*^{in}*: zāra'tu-ka* in the third. In both cases the landowner is engaging the tenant. However, in the second contract, which concerns the *mughārasah*, the equivalent wording is قد اتّفق فلانٌ وفلانٌ *qad itta-faqa fulān*^{un} *wa-fulān*^{un}: "So-and-so and So-and-so have agreed together". The implication is almost certainly that the landowner and the tenant in the *mughārasah* hold positions closer to equal partners, since, as will be remembered from Part I of this book, the tenant's contribution to the partnership can be considerably more substantial

in the *mughārasah* than in the other two types of sharecropping contract.

Second, there can be clear differences in the matter of which party supplies the seed or plants. In the case of the second (*mughārasah*) contract, it is explicitly stated that the trees to be planted may be supplied by both parties either equally or unequally (*bi-al-sawīyah aw al-tafḍīl*). In the third (*muzāraʿah*) contract it is again explicitly declared that either the landowner or the tenant may supply the seed. In the first (*musāqāh*) contract however, neither party is mentioned as owning the trees, though it may be assumed that they belong to the owner of the land.

Third, in the first two contracts (*musāqāh* and *mughārasah*), the duties of the tenant are spelt out in some detail and concern in both cases principally looking after the trees and the irrigation channels on which they depend. In the third (*muzāraʿah*) only the sowing of the seed is mentioned.

In connection with the duties of the tenant, in the case of the *mughārasah* contract there occurs the phrase *bi-ʿurf al-jihah* (according to the custom of the district), though it is considered unlikely that there is any significance in the absence of a similar reference in the other two contracts, since it may be presumed that, as with the Yemen Civil Code sharecropping Articles discussed in Chapter 3 (Section 3.5 above), where specific conditions are not stated local *ʿurf* will take precedence. After all, as they stand, these "model contracts" are hardly more than the bare bones of what a legally binding agreement would have to cover. Many—perhaps even most—of the conditions which could conceivably lead to dispute are simply not mentioned at all. Which party, for example, has the responsibility of covering the transport of the landowner's share of the crop? Does the tenant have to do this, or will the landowner collect it himself? Again, which party is responsible for the upkeep of boundary walls, wells, terraces, and other fixed installations? For example, cleaning out the water channels is clearly the tenant's responsibility, and indeed is stated as such in the *musāqāh* and *mughārasah* contracts. But where does "cleaning out" stop and "rebuilding" begin? Such questions are not answered by these model contracts and it may be presumed that any dispute involving them would be referred to *ʿurf al-jihah*, the custom of the district.

In the third of the contract models (that concerning the *muzāraʿah*) it is notable that the form it is couched in is explicitly verbal, and even the other two could be construed as being models of verbal contracts

since there is no mention of any need to record them in writing. If this is so, then the reference at the end of the second and third contracts to recording the date of the contract could be understood as referring to a written record to be kept merely as a kind of *aide mémoire* for either or both of the two parties and possibly also the recorder. This impression of the essentially verbal nature of such contracts (whether or not they are also committed to writing) will be strengthened in the study now of three modern Yemeni sharecropping contracts.

8.33 Three Written Contracts from al-'Udayn

In the course of the field survey of 1992 and 1993 the opportunity was taken to examine several documents in the possession of farmers which recorded their sharecropping contracts with landowners. All these were in the areas where it is the custom to record such contracts in writing (that is, the Northern and Southern Mountains), but with the exception of al-'Udayn in Wādī 'Annah (west of Ibb) all were seen in isolated areas without means of photocopying. At al-'Udayn however the *amīn al-maḥall* was able to provide a photocopy of his record of three example contracts of sharecropping. All are dated Muḥarram 1407 (which began on 6th September 1986). An annotated transcription of each of the three documents is included in Appendix 3. The following is the present writer's own translation.[25] (The term *ajīr* (tenant) has been left untranslated.)

Contract No.1

> In the name of God the Merciful, the Compassionate.
> 'Abdallāh Muḥammad 'Aqīl [from the *'uzlah* of] Banī Zuhayr, [living at] the group of houses [called] al-Sharqī and being of sound mind and in complete concurrence with the law, came to us to [become] an *ajīr* of Shaykh 'Abd al-Qawī bn Mulhī and his relatives who are the sons of 'Alī Mulhī and 'Abdallāh Hazzā'. [The farm in question] is the locality [called] al-Rummānah which is bounded on the north by the bed of the Wādī ['Annah] and on the west by al-Khurayshabah, and above which is the property of the above mentioned people worked by the *ajīr*

[25] I am very grateful to Mr 'Abdallāh 'Abduh 'Abdallāh, the *Amīn* of al-'Udayn, for allowing me to photocopy these three contracts, and especially to Mr Jābir Muqbil 'Abd al-Malik, Director of the Agricultural Office, al-'Udayn, for devoting considerable time to help me understand them. A glance at the original Arabic in Appendix 3 below will show that their short-hand nature requires considerable interpolation to be made which is impossible without an intimate knowledge of the local area.

Murshid Mulayk. [This contract was drawn up] in the presence of witnesses who are 'Abduh Muḥammad Murshid [from] the town [i.e., al-'Udayn] and Hazzā' Mahdī [from the *'uzlah* of] Jabal Baḥrī, though God is the best Witness. [This contract] was drawn up in the month of Muḥarram in the year 1407 one-thousand four-hundred and seven after the Hijrah of the Prophet, may the most excellent blessing and peace be upon him. The said *ajīr* is an *ajīr* who is not a [land]owner. [The responsibility will be] on him to deliver the landowner's share of the harvest to the place [where it is to be] handed over, to maintain the boundaries [of the property] and to give [the landowner] gifts from the crops [when he visits the farm, in accordance with] the precedent of the place. ...

Contract No.2

In the name of God the Merciful, the Compassionate.
Hazzā' Mahdī Qāsim [from the *'uzlah* of] Jabal Baḥrī, being of sound mind, came to us to [become] an *ajīr* of Shaykh 'Abd al-Qawī bn Mulhī. [The farm in question] is the locality [called] al-Qubā'ī al-Ṣaghīr, [is] totally irrigated, and is bounded on the north by the bed of the Wādī ['Annah], on the west by the Wādī al-Musharraqah, on the south by [the place called] Shutāf, and on the east by [the Wādī] al-Qubā'ī al-Kabīr. The said person is an *ajīr* who is not a [land]owner. [The responsibility will be] on him to deliver the landowner's share of the harvest to the place [where it is to be] handed over, to maintain the boundaries with the boundaries [of neighbouring properties], and [to carry out] what *ajīr*s must do [in accordance with] the precedent of the place. [This contract was drawn up] in the presence of witnesses who are Jābir Muqbil 'Abd al-Malik the head of the al-'Udayn agricultural [office], and Muṣliḥ Muḥammad Nāyif [from] al-Sharā'ib, though God is the best Witness. [Additional] to this [contracted farm the *ajīr* will also tenant the farm in] the locality [called] Munākh al-Shaykh in its entirety which is bounded on the north and the west by the Wādī ['Annah], on the east by the terraces of 'Awaḍ and the road [to al-Far'], and on the south by the road. [This contract] was drawn up in the month of Muḥarram in the year 1407 AH. ...

Contract No.3

In the name of God.
Ḥamūd 'Alī Qāyid, being of sound mind, came to us to [become] an *ajīr* of 'Abd al-Wāḥid 'Abd al-Qawī bn Mulhī. [The farm in question] is the terraced area of al-Miqṭār opposite the house of the tenant (*musta'jir*) which bounds [the farm] on the east, and on the west it [is bounded] by the Wādī Dāḥaḍ, on the north by the road leading to the bed of the Wādī ['Annah], and on the south by the property of Shaykh Ṣādiq bn Ṭāhā. The said person is an *ajīr* who is not a [land]owner. [The responsibility will be] on him to cultivate fully, to deliver the landowner's share of the harvest to the place [where it is to be] handed over, and to maintain the boundaries with the boundaries [of neigh-

> bouring properties]. [This contract was drawn up] in the presence of witnesses who are 'Abduh 'Abdallāh Sayf and Amīn [son of] our *sayyid* Ghālib Aḥmad 'Aqlān, all of whom are from the town [i.e., al-'Udayn]. [This contract] was drawn up in the month of Muḥarram in the year 1407 AH. ...

All three documents end with the pious set phrase *kataba al-rājī 'afw rabbi-h* (literally, he who hopes for his Lord's pardon wrote [this contract]—that is to say, the *amīn al-maḥall* himself), followed by his signature ('Abdallāh 'Abduh 'Abdallāh) and his official stamp ('Abdallāh 'Abduh / *Amīn* of al-Sharā'ib and al-'Udayn / Yemen Arab Republic).

Making allowances for personal stylistic characteristics of the recorder, these three contracts are very much the same in form and general content as others examined in the field. The names and place of residence of not only the tenant and the landowner but also the two witnesses are recorded and the plot which is to be tenanted is delimited by specifying the surrounding plots and the major bounding features such as main roads and watercourses. What is perhaps more remarkable is what is *not* specified in the contracts. Apart from the statements that the tenant is to deliver the landowner's share of the harvest to him and to maintain the boundaries of the land, the responsibilities of the tenant are not spelt out beyond giving the landowner samples of the crop if he should come to inspect it (in Document No.1), doing what it is customary for tenants to do (in Document No.2), and cultivating the land fully (in Document No.3). In particular, there is no statement of the proportion of the crop which is due to the landowner at the harvest, and even though all three contracts are sharecropping contracts, there is no indication which type of contract they are, whether *muzāra'ah*, *mughārasah* or *musāqāh*, as the Ḥaḍramī contract proformas discussed in the previous subsection (8.32) might have given cause to expect. Again, there is no statement of the responsibilities of the landowner.

When questioned about why these details should be lacking both the *amīn al-maḥall* and the head of the agricultural office at al-'Udayn pointed first to the phrase *sālif al-balad* (the precedent of the place) which occurs in Document Nos.1 and 2. "Everyone knows", they said, what was required by custom of both the tenant and the landowner, and therefore to write it in the contract would be superfluous. This must be so, but it does not explain why the responsibilities which are stated, and in particular delivering the landowner's share to him

and maintaining the boundaries of the property, both of which figure in all three contracts, should receive special mention, since they too are presumably requirements in accordance with local custom and known to everyone.

On the question of why the proportion of the crop due to the landowner (a half, a third, a quarter, or whatever) was not mentioned in any of these contracts, the head of the agricultural office added that it could not be put in writing in the contract since it was not a specific quantity which could be measured in units of capacity or weight before the total harvest had been measured. This is a curious statement and one which may possibly reflect a degree of uneasiness about the fact that any sharecropping contract by its nature involves an un-Islamic unknown in its conditions, a circumstance already discussed in Chapters 2 and 3 above.

One is left with the strong impression then that even in areas where a contract is traditionally written a written contract is more of an *aide mémoire* than a legal document and that it is the verbal contract which has precedence (as indeed is the case with Islamic contracts generally). The details of any sharecropping contract are well-known to all those involved in accordance with local customary law and do not have to be stated in writing.

8.4 Sharecropping Contentions and Pleas

8.41 The Field Evidence

The following are the main causes for dispute between the parties to a sharecropping contract as quoted by respondents in the field survey of Yemeni sharecroppers and landowners. For the reasons given below, no statistical frequencies can be coupled to the causes and indeed no significance can be attached even to the order in which they are listed.

- The tenant is guilty of negligence (*taqṣīr* or *ihmāl*). (This was mentioned by several respondents in the field survey, though even so they constituted a small minority of the total respondents.)
- The tenant absconds. (This was mentioned by only one respondent in the field survey.)
- The two parties to the sharecropping contract are unable to agree on the size of the yield to be shared.
- The owner of the water is late in supplying the water, or is unable to supply any at all.

- The landowner gives the tenant notice to quit so that he can work land himself. (This was mentioned by only one respondent in the field survey.)
- The landowner gives the tenant notice to quit so that he can build on the land. (This was mentioned by several respondents in the field survey, though all were referring to land in the vicinity of Ṣan'ā' and they constituted a small minority of the total respondents.)
- The tenant is late in handing over the landowner's share of the crop or else its value in cases where the tenant has the responsibility of selling the crop as well as harvesting it.
- There are disputes over *iṣlāḥ al-judrān*, or *ḥifẓ al-ḥudūd*, or some similar phrase meaning the maintenance of the boundary walls, both in their physical upkeep and against encroachment by neighbours. Such disputes are not so much between landowner and tenant but rather between two neighbouring landowners.

The evidence from the field is that disputes would seem to be rather rare in reality and for this reason it is impossible to rank them in order of importance or frequency of occurrence. In fact, some of the reasons for dispute were mentioned by only one or two respondents. A tenant absconding, in particular, would seem to have a great fascination for Islamic jurists, though in practice such a phenomenon probably constitutes rather a rare event.[26]

If a generalisation can be made about present-day disputes it is that they would seem to be least frequent in sharecropping contracts involving annually sown crops (typically cereals and vegetables) and most frequent in contracts over perennial crops (fruit trees and, perhaps especially, *qāt* trees)—though the expression "most frequent" is entirely relative since even here disputes are reportedly by no means common. Moreover, when disputes do occur they are generally described by farmers as *basīṭ* (of no great importance, trivial), and the stated preference was for them to be settled "by customary law" (*bi-ṭarīq ḥukm 'urfī* or *bi-ṭarīq ḥukm qabalī*), as opposed to Islamic *Sharī'ah* law on the one hand and Yemeni civil law on the other.

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[26] As has been seen in earlier chapters, the absconding tenant is an issue gone into by both the Zaydī Ibn al-Murtaḍā in *al-Baḥr al-Zakhkhār* (see Chapter 5 (Section 5.23) above) and the Shāfi'ī al-Nawawī in the *Minhāj al-Ṭālibīn* (see Chapter 4 (Section 4.32) above).

8.42 Three Plea Formats from Ḥaḍramawt

The Arabic texts of three examples of forms of plea which concern sharecropping have been published by R.B. Serjeant.[27] Like the Ḥaḍramī model contracts discussed above (in Section 8.32) all three originate in South Yemen and take the form of models or proformas into which the specific details would be entered—in this case the names of the litigants and the details of the plea. Unlike the model contracts however, these model pleas apply, strictly speaking, only to *musāqāh* contracts in date-palms. Although this book is concerned primarily with northern Yemen, rather than the south and Ḥaḍramawt, and with all types of sharecropping rather than just *musāqāh*, it can perhaps be assumed, in the absence of new material being available, that Serjeant's examples would be equally applicable in other areas of the Yemen where date-palms are grown, notably the plain of Tihāmah, which happens also like Ḥaḍramawt to be predominantly Shāfi'ī.

The first and earliest of the three model sharecropping pleas made available by Serjeant occurs in an Ms. entitled *al-Nubdhah al-muḥarrirah* (or: *al-muḥabbibah*) *li-al-da'wā al-muḥarrirah* which covers model pleas over a wide range of legal fields including the *musāqāh*.[28] Serjeant gives the *laqab* of the author, a Shāfi'ī from Ḥaḍramawt, as Baḥraq, who died in 930/1524, together with a synopsis of his life,[29] and he puts forward the suggestion that

> [Baḥraq's] object in composing the Nubḏah may well have been the desire not so much to regularise pleas set forth in an unscientific manner as he states, but to extend the šarī'ah into territory where 'ādah had prevailed.[30]

The following is the present writer's translation of the sharecropping passage from Baḥraq's text as given by Serjeant (which is reproduced in Appendix 3 below).

> I plead that this person So-and-so engaged me in a *musāqāh* contract over such-and-such a plantation[31] of his to tend all the various kinds of

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[27] Serjeant 1955a: 11; and Serjeant 1964: 63.

[28] The passage on the *musāqāh* occurs at the top of p.11 of the published text (Serjeant 1955a: 11).

[29] Serjeant 1955a: 1; see also Brockelmann: Supplement, II, 554.

[30] Serjeant 1955a: 2. Similar conclusions have been arrived at in different regions and situations by other researchers (see e.g. Layish and Shmueli 1979).

[31] The word used is *ghayḍah* which more usually means a thicket or a jungle, though here it is obvious that cultivated trees are meant, and "plantation" seems therefore to be an appropriate translation.

> date-palm in it, on the understanding that it would be my responsibility to irrigate [the trees], to care for them, to regulate the water channels, to keep the [irrigation] basins and channels in good repair, and to pollinate [the trees] and guard and harvest the fruit, and to do everything else necessary to make them produce fruit. In exchange for the labour necessary for this I would get a third, for example, of the fruit gathered from them. However, he refused to do this, or he decamped, for example, or he was negligent in his work. I am calling for him to fulfil what he was pledged to do.

It is clear from the ending that something is wrong with the text. The plea starts by being put forward by a tenant, whereas it ends with the landowner speaking, as Serjeant notes though he offers no explanation beyond saying that he suspects that something is missing in the text.[32]

The other two model pleas which Serjeant has published come from an undated but probably more recent document from al-Mukallā.[33] Happily, they hold the key to the anomaly within the Baḥraq document. The text as published is reproduced in Appendix 3 and the following is the present writer's translation.

(1) Model for the plea from a landowner in a *musāqāh* contract

> Zayd[34] says: "I plead that I engaged this person 'Amr in a *musāqāh* contract over such-and-such a plantation to tend all the various kinds of date-palm in it, on the understanding that it would be his responsibility to irrigate [the trees], to care for them, to regulate the water channels, to keep the [irrigation] basins which occur in the channels in good repair, and to pollinate [the trees] and guard and pick the fruit, and to do everything else necessary to make them produce fruit. In exchange for his labour he would get a third of the fruit gathered from them. However, he refused to do this, or he decamped, or he was negligent in his work. I am calling for him to fulfil what he was pledged to do. So, O Arbitrator,[35] command him to fulfil it."

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[32] Serjeant 1955a: 11 n.2.

[33] The work is entitled *Taḥṣīl al-da'āwī fī raf' al-shakāwī* by a certain *sayyid* Muḥsin bn Ja'far bn 'Alawī Bū Numayy and the text concerning sharecropping has been published by Serjeant (1967: 63) who notes (:63 n.112) that he received the document in 1958 but he gives no further indication of when it was composed.

[34] Zayd here is of course merely an example name the author of the document has chosen to represent the landowner in the case. He might just as well have said *Fulān*. The same applies to 'Amr for the tenant later in the document.

[35] أيها الحاكم *ayyuhā al-ḥākim*.

(2) Model for the plea from a labourer[36] in a *musāqāh* contract

> 'Amr says: "I plead that Zayd engaged me in a *musāqāh* contract over such-and-such a plantation to tend all the various kinds of date-palm in it, on the understanding that it would be my responsibility to irrigate [the trees], to care for them, to regulate the water channels, to keep the [irrigation] basins which occur in the channels in good repair, and to pollinate [the trees] and guard and pick the fruit, and to do everything else necessary to make them produce fruit. In exchange for my labour I would get a third of the fruit gathered from them. I am calling on him to do immediately what he is obligated to do concerning the fruit, since he has refused to do it. So, O Arbitrator, command him to hand it over to me."

The similarity in wording between these two model pleas on the one hand and that of Baḥraq on the other is so striking that it can be no mere coincidence. With the exception of some minor changes in the vocabulary (the substitution, for example, of *bustān* (garden) for Baḥraq's *ghayḍah*, and of *sawāqī* for *anhār* (both meaning water-channels)) and the addition of the peroration addressed to the *ḥākim*, the text of the Mukallā pleas, when combined, is almost identical with Baḥraq's text. It is clear that either both documents have the same original source, or else that the later (Mukallā) document was copied from the earlier (Baḥraq's) text. If the latter possibility is correct, then the author of the Mukallā document had a more reliable copy of Baḥraq's text than that published by Serjeant, since what has evidently happened in the case of the Baḥraq document is that the model pleas for the two parties to a contract have become conflated into one, probably through a scribal omission of the end of the second plea and the beginning of the first.

As far as the content of these model pleas is concerned, there is little which could be considered unexpected. The lists of duties of the tenant, which occur in both the landowner's plea and the tenant's plea, are very much the same as those mentioned earlier in this chapter in the sharecropping contracts (Section 8.3) and more generally in the discussion of relations between landowner and sharecropper (Section 8.2). Similarly, the lists of possible causes for dispute in these model pleas (the tenant absconds, or he is negligent, and so on) are very reminiscent of those found in the legal works such as Ibn

[36] The expression used here is عامل بمقابل عمله *'āmil bi-muqābil 'amal-hi* and could be translated sharecropping tenant in this context.

al-Murtaḍā's *al-Baḥr al-Zakhkhār* discussed in Chapter 5 (Section 5.23 above).

To what extent Serjeant is correct in suspecting that Baḥraq at least might have been aiming in composing his document to extend the *Sharī'ah* into territory where *'urf* had prevailed, as was quoted earlier, is perhaps debatable. At least, there would seem to be no internal evidence in Baḥraq's model *musāqāh* plea to support the conjecture. Nor does the inclusion of the address to the *ḥākim* (arbitrator) in the Mukallā versions of the pleas make the supposition any more likely. The *ḥākim* in many cases could well be a *Sharī'ah qāḍī*, but it is equally possible for him to be a tribal shaykh, a local official (such as the *amīn al-maḥall*), or indeed anyone whose decision as arbitrator both parties to a dispute respect and agree to abide by. Written collections of legal decisions or opinions (*fatwā*, pl. *fatāwā*) tend on the other hand to be the work of respected *qāḍī*s and *muftī*s. The following Section (8.5) studies those *fatwā*s which concern sharecropping in one such Yemeni collection.

8.5 THE SHARECROPPING *FATWĀ*S OF IBN JA'MĀN

8.51 The Manuscript and its Author

A bound Ms. collection of the *fatwā*s of a Yemeni Shāfi'ī jurist, Burhān al-Dīn Ibrāhīm bn Muḥammad bn Ibrāhīm Ibn Ja'mān, belonged to the late Professor R.B. Serjeant by whose bequest it is now the property of the Department of Islamic and Middle Eastern Studies, University of Edinburgh. Serjeant has recorded that he purchased the Ms. in the Yemen in 1953-54, and indeed an inscription on the page opposite the title colophon of the Ms. records the transfer of the work from the possession of a member of the Ḥaḍramī al-Saqqāf family to that of "Dr Serjeant" on 19th May 1954.[37] Although Serjeant has referred to the collection more than once, as far as is known he never published a study of it.

An imperfect though legible annotation below the title colophon records the year of death of the author as AH 1016 (equivalent to AD 1607). The date of the *fatwā*s can therefore be put at approximately

[37] Serjeant 1955b: 254.

1000/1600. Beyond this and the fact that Ibn Ja'mān was a Shāfi'ī jurist little else is known of him.[38] That R.B. Serjeant obtained the Ms. from a member of the Ḥaḍramī al-Saqqāf family in Ḥaḍramawt suggests that Ibn Ja'mān may well have been a local scholar of the predominantly Shāfi'ī Ḥaḍramawt. Further, of the only two authorities Ibn Ja'mān quotes in the *Bāb al-Musāqāh*, one is called Abū Qushayr who, although no more identifiable so far than Ibn Ja'mān, has significantly the *nisbah* al-Ḥaḍramī. Moreover, Ibn Ja'mān's *fatwā*s on sharecropping deal with the subject exclusively in the context of irrigated date-palms, a type of agriculture typical of Ḥaḍramawt.

On the other hand, several pieces of evidence suggest that a Tihāmah provenance is equally possible and indeed perhaps more likely. The coastal plain of Tihāmah in western Yemen is also a Shāfi'ī area and date-palm growing is as much a characteristic of this region as of Ḥaḍramawt. Further, the quoted authority Abū Qushayr al-Ḥaḍramī is unlikely to have been resident in Ḥaḍramawt, since such a *nisbah* would be applied only outside the region.[39]

8.52 Observations on the Manuscript

The bound Ms. of some 330 folios is the work of a single copyist (though there are occasional short marginal additions or amendments many of which are in a different hand). It is written in an informal *naskh* which is for the most part clear and the frequently recurring words *mas'alah* (question, issue) and *ajāba* ([the Shaykh] replied) are in a larger bolder script. There are 22, 23 or 24 lines to the page. As is common practice with bound Mss. to ease collation and binding, the first word or two of each left hand page is rewritten at the foot of the preceding right hand page.

The orthographical peculiarities found in the Ms. are commonly found in other such works (for example, *alif mamdūdah* for "dagger" *alif* or *alif maqṣūrah*; *hamzah* missing or replaced by *yā'*) and require no special consideration, and with a very occasional exception the Ms. text is clear enough for the Arabic to be readable throughout. The

[38] The fact that he was a Shāfi'ī was held by R.B. Serjeant (personal communication). The standard reference works do not list Ibn Ja'mān.

[39] It is very possible that Abū Qushayr al-Ḥaḍrami was a member of the scholarly Shāfi'ī family with that *nisbah* who have long been established in Zabīd, the capital of Tihāmah, and who are indeed still resident there. However, further research on Ibn Ja'mān's background is clearly necessary.

language is largely good *fuṣḥā* with little colloquialism and although the chapter on sharecropping does incorporate, as one might expect, a few specialised or local terms, all have been encountered elsewhere (for example, *aḥājīn*, and various terms associated with pollinating, which have been discussed earlier in this present chapter) and present no difficulty. Difficulties remain however at certain points as to what precise meaning is intended and how best to reflect the meaning in English.

As is usual with such collections Ibn Ja'mān's collected *fatwās* cover the gamut of religious observance, family law, contracts, and other matters. One of the chapters, entitled *Bāb al-Musāqāh*, is the only part of the work to concern sharecropping and is made up of six *fatwās*. There is no section on the *muzāra'ah* or the *mughārasah*. This may be because *musāqāh* is the commonest system in the lowland Shāfi'ī areas of the Yemen and Ibn Ja'mān was never asked to give an opinion which concerned the other types of sharecropping contract. The absence of *fatwās* on the *muzāra'ah* and the *mughārasah* is unlikely to be because of any Shāfi'ī aversion to such contracts. After all, even *muzāra'ah* contracts, the most problematic of all for Shāfi'īs, are permitted in certain limited circumstances by Shāfi'ī jurists, as was seen in Chapter 4, while the model contracts studied in Section 8.32 above include all three types despite being by a Shāfi'ī author.

At some stage in the history of the bound Ms. its folios have been numbered and a tabulated list of contents, giving the name of each chapter and the folio number on which it begins, has been provided on the leaf before the title page. Using this numbering, the *Bāb al-Musāqāh* starts on page 178b and ends on 180a.

An annotated transcription of the sharecropping *fatwās* is given in Appendix 4 below.

8.53 The Structure and Content of the Fatwās*:*

In the *Bāb al-Musāqāh* (and indeed throughout the collection), the Question and Answer structure of each *fatwā* is very clearly marked. Each *fatwā* starts "*mas'alah*" (Question or Issue), spelt defectively, to introduce the circumstances and the legal question to which they give rise. Then the *fatwā* proper begins with the words "*ajāba shaykh"-nā*" (Our Shaykh responded), and each ends with the pious formula: "*wa-Allāh 'azz wa-jall a'lam*" (God knows best). This is a common pattern in *fatwās* and is in no way remarkable.

In these six *musāqāh fatwās* Ibn Ja'mān cites explicitly only two other authorities, and each time Ibn Ja'mān agrees with their view. These are named as Shaykh al-Mashāyikh al-'Allāmah 'Abd al-Raḥmān Ibn Ziyād (in *Fatwā* 1, lines 12-13; and *Fatwā* 3, lines 9-10[40]); and Abū Qushayr al-Ḥaḍramī, the author of a so far unidentified work called *al-Qalā'id* (in *Fatwā* 1, line 13). As has been remarked already, no details have yet been traced of Abū Qushayr. Ibn Ziyād on the other hand is almost certainly the known authority 'Abd al-Raḥmān bn 'Abd al-Karīm bn Ziyād al-Maqṣarī al-Zabīdī, who died in 975/1567 (that is, only forty years before Ibn Ja'mān's death and perhaps known personally to him).[41]

The content of the six *fatwās* may be summarised as follows:

(1) Situation:
The situation here concerns negligence on the part of the tenant which leads to the loss of part of the yield. The question put to Ibn Ja'mān is whether the tenant is to be held liable for the shortfall.
Decision:
The tenant must compensate the landowner and Ibn Ja'mān quotes *al-Qalā'id* of Abū Qushayr al-Ḥaḍramī to give the method to calculate the loss, which, unfortunately, is rather difficult to interpret. It would seem to have as its basis the separate estimation of the value of the lost fruit on the one hand and the damage done to the date-palms on the other.

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[40] The sharecropping *fatwās* have been numbered 1 to 6 for the purposes of this discussion only. They are not numbered at all in the original Ms.

[41] One work of 'Abd al-Raḥmān bn 'Abd al-Karīm bn Ziyād examined by the present author is a short work on regulations concerning agricultural holdings called *Muzīl al-'anā' fi ḥukm mā aḥdath fi al-arāḍī al-muzdara'ah min al-'anā'* of which there are three copies known. Two Mss. of this work exist in Ṣan'ā' and are available on microfilm in Kuwait, as listed in al-Shanti 1988 (items 249 and 250). The photocopy of a third Ms. (estate of the late Mrs R. Cedzich) is held in the library of the Seminar für Orientkunde, Mainz (though the whereabouts of the Ms. from which it was copied are not known). The present writer has studied the 13-page Mainz copy but the subject matter concerns agricultural problems other than sharecropping. There is only one short and not very revealing reference to *muzāra'ah* in the work and it is therefore clearly not this work of Ibn Ziyād's that Ibn Ja'mān is referring to in two of his *fatwās*. I would nevertheless like to acknowledge greatly the generosity of Professor Manfred Kropp and Mr Nadim Hosny Salameh, both lately of Mainz University, for providing me with a photocopy of the *Muzīl al-'anā'* document and for allowing me permission to quote from it if necessary.

(2) Situation:
This situation is introduced as an accusation by one of the two parties to a *musāqāh* contract that the other had not handed over his share of the harvest. A witness however testifies to the fact that the renewal of the *musāqāh* contract was not confirmed. The question is therefore whether the plaintiff has legal grounds to demand his share of the fruit.
Decision:
Since the contract was not properly renewed, the plaintiff has no case against the accused and is not entitled to a share of the fruit.

(3) Situation:
The situation here again concerns negligence on the part of the tenant leading to a loss of part of the yield.
Decision:
The responsibility lies with the tenant to ensure that the date-palms are well looked after, including that they are properly pollinated. Ibn Ja'mān then adds that the aim of this ruling is to ensure that the landowner gets his proper share since, he would seem to say, no compensation can be payable to the tenant since his loss was caused by his own negligence.

(4) Situation:
Here again, the question is mainly one of negligence on the part of the tenant which results in the loss of part of the yield. The negligence this time is specified as neglecting the date-palms by his failure to irrigate them and to protect the fruit from animals and birds. In addition, the tenant has stolen some palm fronds (*sa'af*) to which he was not entitled. As a result, one of the parties (most probably the tenant) verbally abused the other (the landowner).
Decision:
The tenant must compensate the landowner for the palm fronds he has stolen and also for any damage he may have done to the date-palms by his negligence. Ibn Ja'mān says how the compensation for the damage should be calculated, though unfortunately the Arabic is somewhat cryptic here. Concerning the abuse the perpetrator must be punished with a *ta'zīr* (discretionary) reprimand by the legitimate arbitrator.

(5) Situation:
The circumstances here are essentially a case of a tenant dying before the end of a one-year contract, though they are complicated by the fact that the land is owned by minors of whom their mother is guardian. On the death of the tenant within the period of the contract the tenancy is assumed by his heirs. The problem arises when the heirs continue to work the palms and take the fruit after the expiry of the contract. The situation would seem to be that the heirs of the original tenant are trying to take advantage of minors' rights when their guardian is a woman (though this not explicitly stated). The question put to Ibn Ja'mān is whether or not the tenant's heirs are legally bound to return the fruit they have illegally taken or else its equivalent value if it has already been eaten.
Decision:
For the valid period of contract (that is, the year in which the tenant died) the heirs of the tenant and the minors are to share the fruit. (This implies, though it is not explicitly stated, that the death of the tenant does not cancel the contract.) If the heirs have not shared the fruit with the minors but have rather held onto all of it, then they must return the minors' share if it still exists or else its equivalent if it has already been consumed. As for the fruit harvested after the end of the first year, the heirs have no justification in retaining any of it and they must either return it all or else return its equivalent value.

(6) Situation:
This situation concerns a landowner who found the yield of fruit from his date-palms at harvest deficient and ascribed the deficiency to negligence on the part of the *musāqī*-tenant in properly pollinating the date-flowers and protecting the developing fruit from animals, birds and insects. The questions put to Ibn Ja'mān are, first, whether the tenant is bound to compensate the landowner for the lost fruit from his own share, and second, whether certain specified activities are indeed the duty of the tenant. The list of duties specified here is almost identical to other lists seen in contracts and pleas earlier in the current chapter.[42]

[42] The activities which are specifically mentioned here are: pollinating the spadices; protecting the fruit from animals, birds and flies; keeping the wells in good repair; clearing grass out of presumably the water channels and the land generally; keeping the *aḥājīn* (the irrigation hollows at the bases of the palm-trees) in good repair; and keeping the walls in good repair.

Decision:
If the tenant's negligence has indeed been the cause of the loss of some of the yield, he must compensate the landowner for the amount of the loss. Nevertheless, he has a right to his full share of the fruit which has appeared.

The duties of the tenant are also set out in this *fatwā*. The situation may be summarised generally as follows: any labour required for investment in capital infrastructure (mentioned here are حفر وبناء "digging [earthworks and/or wells] and building") is the responsibility of the owner. On the other hand, the labour for day-to-day operational maintenance (such as clearing and opening the water channels, keeping everything clear of grass, and keeping the banks and the well walls in good repair) is responsibility of the tenant.

In sum, then, four of Ibn Ja'mān's six *fatwās* concern, partly or wholly, negligence on the part of the tenant (Nos. 1, 3, 4 and 6). The other two concern, partly or wholly, the renewal of a *musāqāh* contract (Nos. 2 and 5).[43] In addition, the duties of a *musāqāh* tenant are spelt out (especially in No. 6). All the *fatwās* concern to some extent the need to compensate the wronged party (which is exclusively the landowner), and in two of them (Nos. 1 and 6) Ibn Ja'mān sets out the basis on which the compensation for lost fruit is to be evaluated. Much of the material is repetitive, and the content, especially concerning the duties of the tenant, is very reminiscent of the other sources which were discussed in earlier sections of this chapter.

Perhaps one point is worth making, however. As has been seen, the *fatwās* delivered by Ibn Ja'mān on sharecropping and preserved in this collection number only six—six, that is, out of a total of what must be over 1,000 in the collection. The *Bāb al-Ijārah* (leasing), the section which follows the *Bāb al-Musāqāh* and which concerns the type of contract most like sharecropping, contains some 72 *fatwās*, and the

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repair; clearing grass out of presumably the water channels and the land generally; keeping the *aḥājīn* (the irrigation hollows at the bases of the palm-trees) in good repair; and keeping the walls in good repair.

[43] It was remarked in Chapter 3 (Section 3.21 above) that *ijārah* (leasing) contracts, being subject to time limits, cannot come within the scope of *istiṣḥāb* (i.e., they cannot be presumed to continue indefinitely). It follows therefore that sharecropping contracts, if viewed as essentially *ijārah* contracts, must be renewed periodically and do not automatically run on from one year to the next.

Bāb al-Bayʿ (sale) is even longer. One must ask therefore why sharecropping has received so little attention from Ibn Jaʿmān.

Could it be that around 1000/1600 sharecropping was little practised in the Yemen? Such an explanation would seem unlikely given its great importance today and given also the considerable attention devoted to the practice by Yemeni jurists throughout the centuries in their works of *fiqh* from Ibn al-Murtaḍā in the second half of the 8th/14th century to al-Shawkānī in the early 13th/19th.

Could it be that Ibn Jaʿmān had little interest in the subject and therefore discouraged people from referring problems to him on it? This would similarly seem somewhat unlikely. The Yemen today is still an overwhelmingly rural and agricultural society.[44] It would be no less so in Ibn Jaʿmān's day. It is improbable that an eminent *qāḍī* and *muftī* could close his eyes to what must have been a dominant agricultural practice and especially one which was legally problematic.

A much more likely reason for the very small number of sharecropping *fatwās* in the collection is a fact that was mentioned earlier in the chapter when the field evidence on disputes and contentions was discussed (Section 8.41), namely, that sharecropping, in at least present-day Yemen, would seem to give rise to rather few disputes. Whether or not this is the true explanation, the field evidence on the matter is at least consistent with Ibn Jaʿmān's small number of cases.

8.6 Concluding Remarks on Contracts and Contentions

It has been the purpose of this chapter to examine from a range of sources, including both documentary evidence and the field survey, some aspects of the contractual relationship between landowner and sharecropper in the Yemen. It has been shown how important the precedence or custom of the area is in determining the exact nature of the terms of sharecropping contracts in matters such as the provision of agricultural inputs. At the same time it is striking how similar are the concerns of contracts, pleas and *fatwās* in what sharecropping tenants are required to do, and yet how they are almost silent on any possible infringements which landowners might commit. This appears

[44] As was stated in footnote 5 of Chapter 7 above, in the 1986 census (the latest available at the time of writing), the projection was that by 1990 some 79% of the population of the northern part of the country (8.86 million out of 11.28 million) would still be rural (Yemen Republic 1991: Table 2).

to be so no matter whether the source or area is Shāfiʿī or Zaydī, since the materials covered here embrace both. Further, it has been put forward from both the field evidence and the small number of the Ibn Jaʿmān *fatwā*s that serious disputes between the two parties to sharecropping contracts in the Yemen have probably been not very common in practice, despite the essentially verbal nature of the contracts and despite also the potential theoretical problems posed by sharecropping in Islamic law.

CHAPTER NINE

CONCLUSIONS

Sharecropping land is a widespread and ancient form of tenancy, the basic principle of which—rent as a proportion of the harvest—might seem at first sight so simple as to require little discussion. This book has tried to show in fact that sharecropping in the Islamic context is a highly complex subject and one, moreover, on which the Islamic jurists are very far from consensus.

As has been seen, some of the complexity of the practice is reflected in the Arabic terminology and in the relationship between the contribution of inputs on the one hand and, on the other, the proportional size of the share of the harvest. An attempt has been made in this book to examine both these aspects, especially as they are reflected in the Yemen. Further, sharecropping is not confined to sharecropping land, since animals too can be "sharecropped", as has also been shown.

The basic problem of sharecropping for Islamic law has also been addressed and, as has been seen, it has two related strands. First, there is the ambiguous nature of the sharecropping *ḥadīth*s, the point at which all legal discussion must start. Second, there is the more general Islamic injunction against *gharar* in contracts, and yet some measure of uncertainty or risk is inherent in the very principle of sharecropping.

The Imām al-Shāfi'ī resolved the question of *gharar*, at least to his own satisfaction (though, as it turned out eventually, not quite to the satisfaction of his followers), by limiting the validity of sharecropping to *musāqāh* contracts, in which the trees are extant at the time the contract is made and may form the valid basis for estimating the size of the future harvest. This was a clearly defined and easily comprehensible stance to take, even if a somewhat narrow, literalist one. By the time of al-Nawawī the position of the Shāfi'ī School had become somewhat less purist. As has been shown, al-Nawawī allowed, in addition to *musāqāh*, a limited form of *muzāra'ah*, through having to admit the practical difficulty of excluding from the *musāqāh* annual crops which are grown under and beside irrigated trees, since those too would benefit from the same water and the same labour as the trees of the legitimate contract. It would appear, in other words, that

the purist, narrow ruling of al-Shāfi'ī had eventually to bend, even if only a little, when confronted by practicalities.

The Shāfi'ī position, even in its developed form as attested by al-Nawawī, is indeed particularly interesting from the point of view of a gulf not between the *Sharī'ah* on one hand and practice on the other, but rather between the theories of some jurists on the one hand and the practice of those physically involved in the system on the other. Although from the theoretical Shāfi'ī standpoint, only *musāqāh* and a limited form of *muzāra'ah* are valid, it has nevertheless been shown in this book that not only do other forms of sharecropping exist in practice in Shāfi'ī areas of the Yemen, but at least one Shāfi'ī writer actually provides model contracts (examined in Chapter 8, Section 8.32 above) for the "un-Shāfi'ī" forms of *muzāra'ah* and *mughārasah*.

On the question of the ambiguity of the sharecropping *ḥadīth*s, the point of view has been put forward that a close reading of the texts of those *ḥadīth*s which seem to prohibit sharecropping can lead to the conclusion that it was not the Prophet's intention to prohibit the practice in and for itself, but rather only those forms of it which might be unfair to the sharecropper. Such is the view of the pragmatic al-Shawkānī, as was seen in his discussion of the subject in the *Nayl al-Awṭār*. He, like his Zaydī predecessor al-Mahdī Ibn al-Murtaḍā, allows all the three main forms of sharecropping, and declares invalid only those variations which include potentially inequitable stipulations, such as sharing systems based on the production of different parts of the land. It is this Zaydī stance, rather than the narrower Shāfi'ī stance, which is reflected in the Yemeni Civil Code *al-Qānūn al-Madanī*.

A further theme running through the discussion of Islamic sharecropping and Yemeni sharecropping in this book has been the position of the customary law, the *'urf*. The importance of *'urf* both as part of Islamic law and as a complement to statute law has been outlined in general terms, and, regarding specifically sharecropping, it has been shown that the Islamic legal authorities, including even the Shāfi'ī School as exemplified by al-Nawawī, refer the reader to *'urf* where there is no specific guidance otherwise available. So also does the Yemeni Civil Code *al-Qānūn al-Madanī* (as, for example, in Article 736 concerning the *mughārasah*, and in Article 738 on how to treat crops with more than one harvest per year). In discussing Yemeni contracts and disputes it has similiarly been shown how important the role of *'urf* is in regulating sharecropping and how frequently there

occur phrases which point to the relevant custom as the arbiter of the practice: phrases such as *sālif al-balad* (according to the precedence of the place, as in the first and second of the al-'Udayn contracts), or *ḥasab al-'urf* (according to custom, as in the responses of many Yemeni farmers interviewed in the field survey when asked why there should be such variation in the way sharecropping is organised), or *al-'urf al-ghālib* (the dominant custom, as used by al-Nawawī when he indicates how a contract should be worded), or *'urf al-jihah* (the custom of the district, as in Article 736 of the Yemeni Civil Code, *al-Qānūn al-Madanī*).

In short, whatever the difficulties concerning sharecropping that certain Islamic jurists may raise, this system of land tenancy is nevertheless sanctioned by custom and practised in Islamic countries. This is so not least in the Yemen.

A BRIEF REVIEW OF THE SOURCES ON WHICH THIS BOOK IS BASED

A. LITERARY SOURCES

Primary Literary Sources

Sharecropping has been discussed by Islamic legal authorities from the earliest times. Since there is no direct allusion to sharecropping in the Qur'ān, the point of departure for Islamic legal discussion is always the several *ḥadīth*s (Traditions of the practice of the Prophet Muḥammad) which mention the practice, and the original texts of these *ḥadīth*s, as recorded in the two most influential of the "canonical" collections, those of Muḥammad bn Ismā'īl al-Bukhārī (d. 256/870) and Muslim bn al-Ḥajjāj (d. 261/875), have been studied in Chapter 3 above. Discussion of sharecropping is to be found in early Arabic works on land tenure and taxation, such as the *Kitāb al-Kharāj* of Abū Yūsuf (d. 203/818),[1] or the slightly later *Kitāb al-Kharāj* of Qudāmah (Abū al-Faraj Qudāmah bn Ja'far al-Kātib al-Baghdādī, d. 320/932), while practically every work on *fiqh* (Islamic jurisprudence) from the time of Muḥammad bn Idrīs al-Shāfi'ī (d. 204/820) to the present day has its chapter on sharecropping. Such chapters from four *fiqh* works have been the object of comparative study in this book to represent the views of the two main *madhhab*s (Islamic legal Schools) present in the Yemen: the Shāfi'ī works the *Kitāb al-Umm* of al-Shāfi'ī himself and the *Minhāj al-Ṭālibīn* of Muḥyā al-Dīn Yaḥyā bn Sharaf al-Nawawī (d. 676/1277), which were the subject of Chapter 4 above,

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[1] Abū Yūsuf's *Kitāb al-Kharāj* was commissioned by the 'Abbāsid caliph Hārūn al-Rashīd (*reg.* 170-193/786-809). Several translations of it into western languages have been made, including those into English by A. Ben Shemesh and Abid Ahmad Ali. (Of these, Ali's version is often confusing and in places unintelligible. That by Ben Shemesh is very much clearer.) The section on sharecropping in these translations is to be found in Ben Shemesh 1969: III, 114-117 and Ali: 175-181. The equally famous *Kitāb al-Kharāj* of Abū Yūsuf's contemporary, Yaḥyā bn Ādam (d.203/818), makes no reference to sharecropping other than briefly to quote a recommendation concerning the practice attributed to the Umayyad caliph 'Umar II (bn 'Abd al-'Azīz, reg. 99-101/717-720) (Ben Shemesh translation 1958: I, 53).

and the Zaydī works *al-Baḥr al-Zakhkhār* of Ibn al-Murtaḍā (al-Mahdī li-Dīn Allāh Aḥmad bn Yaḥyā al-Murtaḍā, d. 840/1437) and the *Nayl al-Awṭār* of Muḥammad bn 'Alī al-Shawkānī (d. 1250/1834), which were studied in Chapter 5 above. In addition, the relevant Articles of the modern *al-Qānūn al-Madanī* (Civil Code) of the Yemen have also been examined in detail (in Chapter 3 above).

Other primary sources which can yield information on attitudes to sharecropping and details of the practice are collections of *fatwā*s (juridical decisions or opinions), and the study of the relevant section from one such Yemeni manuscript collection, so far unpublished, of around 1000/1600 has been included in Chapter 8 above.[2] Further materials include records of sharecropping contracts and pleas, and a selection of these from the Yemen has been detailed and examined also in Chapter 8. A further source is Arabic treatises on sharecropping, of which a number exist, and one such document, an unpublished Ms. from South Yemen called *Kitāb tashīl*[3] *al-mudhākarah bi-aḥkām al-mukhābarah wa-al-muzāra'ah wa-al-mughārasah wa-al-munāsharah* by a certain Shāfi'ī shaykh of the Ḥaḍramī Bā Kathīr tribe, has been be referred to several times throughout this book (as the Bā Kathīr Ms.).[4]

In addition to these literary sources, information and materials collected in the field may also be considered a primary source, and they can moreover be of essential value in interpreting the literary sources. During the course of the research for this book North Yemen was visited twice for field study totalling four months in 1992 and 1993. The details of the objectives and execution of these field tours are given in Section B below.

Secondary Literary Sources

Apart from the many general introductions to Islamic law which are available and of which several have been referred to in the course of

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[2] The collection is of the Yemeni Shāfi'ī jurist, Burhān al-Dīn Ibrāhīm bn Muḥammad bn Ibrāhīm Ibn Ja'mān (d. 1016/1607). The bound Ms. was kindly made available to the present writer by the late R.B. Serjeant and is now the property of the Department of Islamic and Middle Eastern Studies, University of Edinburgh.

[3] تسهيل.

[4] A photocopy of this Ms. also was made available to the present writer by the kindness of R.B. Serjeant and is now owned by the Department of Islamic and Middle Eastern Studies, University of Edinburgh.

this book,[5] major modern works which stand out as especially useful in the present context of Islamic sharecropping include Frede Løkkegaard's *Islamic Taxation in the Classic Period* and Ziaul Haque's *Landlord and Peasant in Early Islam*, both of which are largely devoted to the question of Islamic land tenancies including sharecropping and to the interpretation of the often ambiguous early Islamic literary materials.[6] There are numerous slighter studies of aspects of Islamic taxation which include references to sharecropping,[7] especially when state-owned land is being considered, since in such cases a distinction is often difficult to make between, on the one hand, a land tax, such as *kharāj* or *'ushr*, received by the Islamic state by virtue of its being the state, and, on the other, a rent received from a tenant by the state by virtue of its being the landlord.

Also relevant, since sharecropping inevitably involves contracts, are a number of works specifically on the Islamic law of contract, including S.E. Rayner's *Theory of Contracts in Islamic Law*.[8] For the detailed study of how the four Sunni legal Schools differ in their attitudes to specific contracts, 'Abd al-Raḥmān al-Jazīrī's *Kitāb al-fiqh 'alā al-madhāhib al-arba'ah* provides an accessible introduction to what is a highly complex subject.[9] Relevant secondary studies of Shī'ah positions, and even more so, the specifically Zaydī position, are much thinner on the ground, though the works of R. Strothmann and W. Madelung (on the Zaydīs) and H.M. Ṭabāṭabā'ī (on the Shī'ah stance more generally) can be mentioned here to provide background information.[10]

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[5] Essential background introductions to Islamic law include Schacht 1950; Milliot 1953; Fyzee 1955; Schacht 1964; Coulson 1964; Doi 1984; and Kamali 1991. Seminal texts by the older generation of Islamicists who laid the foundations of the systematic study of Islamic law by European scholars, and which have been cited in this book, include Van Den Berg 1896 and Goldziher 1910.

[6] Løkkegaard 1950; Haque 1977. D.C. Dennett's (1950) study of early Islamic taxation overlaps in subject matter with Løkkegaard's, though Dennett makes no substantial mention of sharecropping.

[7] A great many articles and other works which throw light on Islamic attitudes to land tenure and tenancies have been published over the years. The following have been found of special interest by the present author: Poliak 1936, Poliak 1940, Yusuf 1957, Nadvi 1971 and Dūrī 1974. Others have been cited in the course of the book.

[8] Rayner 1991; also Chehata 1968; Chehata *EI2*, article "*'Aḳd*".

[9] Al-Jazīrī 1969. The sections on sharecropping are in Vol. III, 1-33.

[10] See especially Ṭabāṭabā'ī (1983) on the *kharāj*; also Strothmann *EI*[1] article "*al-Ẓaidiyya*"; and Madelung *EI*[2] article "*Imāma*". As far as can be seen, there is no discussion anywhere of the specific Zaydī stance on sharecropping outside the primary Zaydī *fiqh* sources, two of which have been examined in detail in Chapter 5 above.

Works on the foundation and early history of the Zaydī state in the Yemen include those by A.S. Tritton and Cornelius Van Arendonk,[11] while for particular periods or aspects of Yemeni history a large number of special studies have been made, including those of G. Rex Smith on the Ayyūbids and Rasūlids.[12] Among the many books and articles which have appeared on the customary law of the Yemen, and in particular the supposed dichotomy between the *Sharī'ah* dispensed by the learned *Sādah* (the *sayyid* descendants of the Prophet) on the one hand, and on the other the *'urf* or *ṭāghūt* (the customary law of the tribes), may be mentioned particularly the instructive work of Paul Dresch[13] and the many articles on the subject by R.B. Serjeant and others.[14] On the historical development of Yemeni society more generally two works by Qā'id Nu'mān al-Sharjabī, *al-Sharā'iḥ al-ijtimā'īyah al-taqlīdīyah fī al-mujtama' al-yamanī* and *al-Qaryah wa-al-dawlah fī al-mujtama' al-yamanī*, deserve particular mention.[15]

Concerning modern field studies of sharecropping in practice throughout the world, undertaken by specialists from a variety of fields and including economists, anthropologists, historians and geographers, there is by no means any dearth of material. In the specific case of the Yemen however there has been as far as is known only one field study devoted wholly to the subject: the UN/FAO agricultural development study of the mid-1980s, the findings of which has been examined in Chapter 6 above.[16] A useful background to recent land tenure patterns in the Yemen is given by 'Abdallāh Aḥmad Nu'mān in his *Qaḍāyā wa-mushkilāt al-tanmiyah al-zirā'īyah.*[17] Comparative information from a number of studies from both within and outside the Islamic world have been cited in this present book, especially in Chapter 2 above when a world view of sharecropping was presented.

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[11] Tritton 1925; Van Arendonk 1960.

[12] Smith 1969 and 1978.

[13] Dresch 1993.

[14] The two recent Variorum editions (Serjeant 1991 and Serjeant 1995) reprint many of R.B. Serjeant's articles on Yemeni and South Arabian customary law. A small sample of studies on the subject by other authors might include: Rossi 1948; Rathjens 1951; Chelhod 1975; Shāhir 1991; Dostal 1992; al-Sulmī 1993. Others have been cited throughout the book.

[15] Al-Sharjabī 1986 and al-Sharjabī 1990.

[16] UN 1987. As has been seen in the course of this book, sharecropping is the dominant form of land tenancy in the Yemen and it is not therefore surprising that a large number of studies of the Yemen, and particularly the agriculture of the Yemen, mention sharecropping, though generally they do so only in passing.

[17] Nu'mān 1989: especially 84-174.

Of special note perhaps, in the context of Islamic countries, are A.K.S. Lambton's study of Iranian agriculture around 1950,[18] and a number of papers written during the first half of the twentieth century which deal specifically with sharecropping in former French colonial North Africa.[19] More generally, there is a useful collection of studies edited by T.J. Byres which provides much comparative material concerning instances of sharecropping around the world.[20]

B. Field Sources

The Field Survey: Methodology

Field information was collected in the northern part of the Yemen during two periods of field study totalling some four months in 1992 and 1993.[21] The aim of the first field visit of five weeks in September and October 1992 was primarily to gain an acquaintanceship with the northern Yemen at first hand and in particular its agricultural geography. Journeys were made to several regions including the high plateaux around Ṣan'ā', the mountains to the west of Ṣan'ā', the Zabīd area on the coastal plain of Tihāmah and the mountains around Ibb. In each region an overview of agricultural practices and particularly land tenancy and sharecropping systems was gained from conversations with landowners, tenants, *qāḍī*s, officials of the Ministry of Agriculture and others with specialist knowledge. The field information so gained provided the basis for a longer and more intensive field visit a year later during which a more systematic survey could be conducted.

This second field visit of over two months was undertaken during August, September and October 1993. A list of topics, based on questions that had arisen during the first field trip and from the study of

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[18] Lambton 1969.

[19] These include the important doctoral study of the French colonial lawyer Louis Milliot (1911), and a surprisingly large number of lesser papers produced in the 1930s, mainly by members of the legal fraternity in French North Africa, including those by Georges Rectenwald (1930), J. Abribat (1934), J. Roussier-Théaux (1935), Philippe Noël (1938), Maurice Pouyanne (1939) and Kellal Almenouar (1939).

[20] Byres (ed.) 1983.

[21] The author is grateful for the grant of £250 from the Carnegie Institute towards the costs of the first field visit, and of £500 from the University of Edinburgh Development Trust towards the costs of the second field visit.

certain Arabic texts[22] and secondary literature was drawn up as the basis for a more systematic survey of farming practices, especially crop-sharing, and the part played in them by *'urf* (customary law).

In each location visited information was sought from local farmers and other knowledgeable sources on the following topics:

- Background information on the location, the landholdings, and the marketing or disposal of the produce;
- Information on the crops, and the ownership of trees and other perennials;
- The source of the agricultural water (rain, well, *ghayl*, *sayl*[23]), and the ownership of the water rights and, where present, the water pump;
- Whether the land is owner-farmed, farmed by a tenant paying a fixed rent, or sharecropped;
- If tenanted for a fixed rent or sharecropped,
  - the details of the contract, including the local terminology involved;
  - whether the contract is written or verbal;
  - which party is responsible for supplying the seed and other agricultural inputs;
  - the amount paid in rent, either as a fixed sum or a proportion of the crop, and if a proportion, how much is due to the landowner, the sharecropper, the water pump owner (if present), and whether these proportions are paid in cash or in kind;
  - the length of contract, and whether there is any special renewal procedure;
  - whether by custom any services or special gifts are expected of the tenant which are not specified in the contract;
- Details of sharecropping contracts which involve animals, including the local terminology involved, and details of any customary presents generally to the owner of the animals;
- The main causes of disputes between landowners and their tenants and neighbours, and the methods of settlement of such disputes.

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[22] In particular, the passages on sharecropping in Ibn al-Murtaḍā's *al-Baḥr al-Zakhkhār* discussed in Chapter 5 (Section 5.2) and the sharecropping *fatwās* of Ibn Ja'mān discussed in Chapter 8 (Section 8.5).

[23] The terms *ghayl* and *sayl* were introduced in Chapter 1 (Section 1.22) and have been further examined in Chapter 6 (especially Section 6.42).

Sixty-six interviews were conducted with approximately 100 tenants, landowners and others involved in agricultural matters, sometimes in groups of two, three or four, but more often individually. Sixty of these interviews were recorded on audio cassettes, covering about 13 hours of recording time. The other six were taken down in note form only, in most cases because conditions were not suitable for audio recording (often because a water pump was working close by). In addition, conversations of a more casual kind were engaged in with market traders, motor pickup owners and other Yemenis about agricultural matters whenever the opportunity arose.

The interviews, though loosely structured, were of a free-flowing nature as far as possible, and although most respondents were asked most questions, there was no meticulously applied format.[24] Where a line of questioning seemed to be producing no useful information, or no additional information, it was abandoned. On the other hand, where a question provoked an unexpected or interesting response, the subject was pursued and often produced a new line of questioning which was followed in later conversations.

Objections to the recording of the interviews on the grounds that respondents would be inhibited from speaking the truth are judged to be unfounded. In the first place, no information of a particularly sensitive economic, political or personal kind was being demanded, and names of respondents were deliberately not asked for (though in fact many respondents volunteered theirs). In any case, most Yemenis have already become accustomed to hearing Yemeni farmers and others being interviewed on radio and often on television too. In the event, practically all the respondents talked willingly.

Recording the interviews also had positive advantages. It allowed the extraction of much more information from the responses than manual note-making would have permitted, and moreover a greater certainty than would otherwise might have been possible about the exact meaning of what respondents said, particularly in cases where unfamiliar terminology and dialectal usages were involved, since doubtful passages in the recordings could later be studied at leisure and if necessary played back in the presence of other respondents

[24] It should be mentioned that the 66 interviews did not form a formal questionnaire survey. It was considered that such an approach would have been inappropriate, given both the nature of the material being enquired into and also the lack of a team of skilled interviewers.

from the same area. This was particularly valuable in the case of older farmers whose diction was not always fully comprehensible to the present writer on first hearing but among whom were found some of the most informative respondents concerning traditional practices.

The Field Survey: Coverage

Table 6.1 (in Chapter 6 above) shows the regions into which the locations at which the interviews were conducted have been classified. The criteria on which the classification is based are climate, topography and dominant sources of water. Figure 6.1 (also in Chapter 6 above) maps the locations of the interviews in relation to these regions.

As can be seen from the table and figure, all the study regions were represented by at least five settlements each and at least 13 interviews, except the Northern Plateaux in which the available time permitted only seven interviews to be conducted. Further, in the Central Tihāmah region only one settlement (Mishrāfah) was visited in the Tihāmah piedmont zone. This was unfortunate, and particularly so since this zone is an extremely important area of *sayl* (spate) irrigation and *sayl* as a water source is not well represented in the field survey data as a whole. But because of both the hostile summer climate and the difficulties of transport away from the few tarred roads in the region, more time could not be devoted to extending the study to other settlements in the Tihāmah piedmont. It is considered however that the main part of the Central Tihāmah and also the other three regions are reasonably well represented by the sample settlements and interviews.

Nevertheless, the number of farmers covered in the interviews is of course a negligible proportion of the total population involved in agriculture, and given the large differences in conditions both between and within regions, and therefore the number of subsamples necessary for full analysis, this sample cannot be considered a reliably representative sample in terms of strict statistical analysis. The representation of lands irrigated by *sayl* in particular, as already noted above, was less than desirable.

The aim of the field survey was not however to collect data of an essentially quantitative kind, such as the economic conditions of the farmers or the relative productivity of different crops, and it does not claim to be representative statistically of even the northern part of the Yemen. In view of the practical and logistic difficulties of field surveys

in areas such as the Yemen (including particularly transport and accommodation in rural areas), representative coverage of the whole country incorporating statistically sound sampling methods is hardly a practical possibility for individual researchers.[25] In the present survey a particular settlement was often chosen to be visited not for any sound scientific reason but simply because a pickup vehicle was chanced upon that happened to be going there and had a space vacant among the sacks of grain and the couple of goats, and returning to base from remote settlements so selected sometimes proved difficult and time consuming.

Even so, an effort was made to collect information of a qualitative nature over as wide an area and in as many settlements of the northern part of the country as was practically feasible, so that as much detail as possible could be examined of the variability of terminology, procedures and practices in the field of Yemeni agricultural tenancies and in particular sharecropping. In each settlement visited as many farmers as possible were engaged in conversation, though it was found in fact that replies to the same questions in the same settlement very soon began to produce repetitive answers after a few knowledgeable respondents had been interviewed. In addition visits were paid in each area to local officials, such as *qāḍī*s and village registrars, and to the regional and local representatives of the Ministry of Agriculture, and these were also interviewed.

[25] Even international organisations and consultancies backed by far greater means than individual researchers have reported similar problems, as, for example, in the socio-economic survey associated with the building of the road from Ta'izz to al-Turbah funded by the World Bank (Mitchell 1978: 17). Similarly, the UN report on Yemeni sharecropping, which will be referred to in more detail later in the text, listed a number of problems which the field survey team encountered, some of which were of a practical or logistic nature and included transport difficulties (UN 1987: 4).

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APPENDICES

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APPENDIX 1

GLOSSARY OF TERMS FOR ISLAMIC SHARECROPPING CONTRACTS

The following table summarises all the Arabic terms for sharecropping contracts found by the present writer in literary sources and in addition those he has collected from verbal sources in the Yemen. The entries are in the Arabic alphabetic order of the root. It will be readily observed that the large majority of the terms are of the pattern *mufā'alah* (that is, the most common pattern for the verbal noun of Form III verbs) which implies a relationship of one person acting towards or with another, as is appropriate for contracts between two parties. It may be noted that some of the terms have other meanings in other contexts (e.g. *muḥāqalah*, *mushārakah*, *munāṣafah*).

A. TERMS FOR SHARECROPPING PROPER:

	Root	Term	Comments
1	أجر *'-j-r*	مؤاجرة *mu'ājarah*	According to Haque (1977: 10) this is a land tenure contract of the sharecropping type, though given the root from which the term comes, it should apply more generally to leasing or hiring contracts. Cf. *ajr* (renting, wage).
2	أكر *'-k-r*	مؤاكرة *mu'ākarah*	Haque (1977: 19) for example uses the term to mean sharecropping. Cf. *akara* (to plough, cultivate).
3	بذر *b-dh-r*	مباذرة *mubādharah*	The term is sometimes applied to contracts where the landowner provides the seed corn (see Løkkegaard 1950: 175). Cf. *badhr* (seed).

	Root	Term	Comments
4	حقل *ḥ-q-l*	محاقلة *muḥāqalah*	This term is sometimes applied to a land tenure contract of the share-cropping type (see Haque 1977: 10), though in most cases it has a more specific application (see the section above on terminology in Chapter 2 (Section 2.3) of this book). Cf. *ḥaql* (field).
		حقل *ḥaql*	In this context, a variant of *muḥāqalah*, as used for example in Muslim *Ḥadīth* 3756.
5	خبر *kh-b-r*	مخابرة *mukhābarah*	Widely found term. The etymology is not certain, and there are several suggestions (see the section above on terminology in Chapter 2 (Section 2.32) of this book).
		خبر *khibr*	Variant of *mukhābarah*.
6	خلع *kh-l-ʿ*	مخالعة *mukhāla'ah*	Serjeant notes this term in the Ḥaḍramī context, though he does not offer an explanation of its etymology (1964: 62 n.110). It may well be connected with the term *khal'ah* which is found in Yemeni sources meaning date-palm (Serjeant 1964: 67 n.135).
7	دفع *d-f-ʿ*	مدافعة *mudāfa'ah*	Al-Shawkānī (*Nayl al-Awṭār*: V, 279) for example uses the term to mean sharecropping. Cf. *dafa'a*, which in the context of sharecropping is frequently the verb used in the literary sources to mean "[the landowner] hands over [land to the sharecropper]".
8	زرع *z-r-ʿ*	مزارعة *muzāra'ah*	A widely found term meaning sharecropping, often specifically on annually sown land. Cf. *zar'* (1. sowing; 2. grain, seed; 3. crop; 4. cultivation, agriculture).
9	سقي *s-q-y*	مساقاة *musāqāh*	A widely found term referring to sharecropping in irrigated gardens, usually with perennial crops,

	Root	Term	Comments
			especially date-palm gardens. Cf. *saqy* (irrigation).
10	سهم *s-h-m*	مساهمة *musāhamah*	Cf. *sahm* (share, portion).
11	شرح *sh-r-ḥ*	شراحة *shirāḥah*	The term is heard in the piedmont zone of the Tihāmah plain meaning sharecropping in banana plantations. Serjeant (1964: 65a; and 1981a: 307) has recorded the same term in Ḥaḍramawt meaning date-palm protection. Cf. *sharaḥa* (to slice up).
12	شرح *sh-r-k*	مشاركة *mushārakah*	Although the term is used to mean sharecropping it is also more generally applied to commercial partnership agreements (see e.g. Rayner 1991: 72; Latham *EI*^{2}, article "*Mushāraka*"). Cf. *sharaka* (to share, participate). The *Sabaic Dictionary* (Beeston *et al.* 1982: 134) gives the entry *s²rk* the tentative reading "?make a crop-sharing agreement" and as a noun "?crop-sharing", though probably the tentative question marks could easily be removed: it would seem highly probably that sharecropping was practised and known by terms from the pre-Islamic South Arabian root cognate with the terms listed here from the Arabic *sh-r-k*.
		شراكة *sharākah*	The usual term for sharecropping among Yemeni farmers and farmers elsewhere in the Arab world. Variant of *mushārakah*.
		شرك *shirk*	Variant of *mushārakah*.

	Root	Term	Comments
13	غرس *gh-r-s*	مغارسة *mughārasah*	Widely found term generally applied to sharecropping contracts in orchards (i.e., perennial crops, as opposed to annually sown crops, for which the term is properly *muzāra'ah* (*q.v.*)). The saplings are often provided by the sharecropper (as discussed in Chapter 3 (Section 3.4 above) and elsewhere in this book). According to the Bā Kathīr Ms. (p.11), the term *mughārasah* is the usage of the people of Medina, and means the same as *munāṣabah* (*q.v.*) and *mufākhadhah* (*q.v.*). Cf. *ghars* (plant, planting).
14	فخذ *f-kh-dh*	مفاخذة *mufākhadhah*	According to the Bā Kathīr Ms. this and its variant *fakhdh* are the terms for sharecropping contracts in Ḥaḍramawt and are identical in meaning with *mughārasah* and *munāṣabah* (Bā Kathīr Ms.: $11_{11\text{-}14}$ and 11_{20}-12_{1}). The term occurs with the same meaning also in the second of model contracts of the Ḥaḍramī Bā Sawdān Ms. which were discussed in this book (Chapter 8, Section 8.33). Regarding the etymology, the verb *fakhadha* can mean to divide, as its verbal noun *fakhdh* means division in the second of the Ḥaḍramī model contracts: *fakhdh al-nisf aw 'alā al-munāṣafah* (lit. "division of the half or by halving") (cf. Serjeant 1964: 62 n.110; also Landberg (1920-42: III, 2402, root *f-kh-dh*) gives *fakhdh*, (pl. *fukhūdh*) as *subdivision d'un tribu*).
		فخذ *fakhdh*	Variant of *mufākhadhah*.
15	قسم *q-s-m*	مقاسمة *muqāsamah*	Although the term is sometimes used to mean sharecropping it is more usually applied to a proportional tax on crops (see Chapter 3, Section 3.32, above), though in cases where tenants work on land of which the state is the landowner, then the distinction

	Root	Term	Comments
			between tax and rent can become blurred. Cf. *qism* (share, portion).
16	نشر *n-sh-r*	مناشرة *munāsharah*	The term perhaps implies that the produce is "spread" between the two partners in the contract. (Cf. *nashr* (spreading).) Although Serjeant asserts that *nishr* means sharing a crop and *nashara* means to give land to someone else to cultivate (1964: 62 n.11), it is not clear whether these are primary meanings or whether rather they have derived from the name of the sharecropping contract *munāsharah*.
17	نصب *n-ṣ-b*	مناصبة *munāṣabah*	The term is used in the second of the Ḥaḍramī model contracts discussed in Chapter 8 (Section 8.32) of this book and is a synonym of *mughārasah* (*q.v.*) and *mufākhadhah* (*q.v.*). According to the Bā Kathīr Ms. (:11$_{20}$-12$_{1}$), the term is used by the people of "al-Shām" (i.e., the Levant) to mean *mughārasah* (*q.v.*). Cf. *naṣīb* (share, participation).
18	نصف *n-ṣ-f*	مناصفة *munāṣafah*	The expression *fakhdh al-nisf aw 'alā al-munāṣafah*, meaning a contract of the *mughārasah* (*q.v.*) type, occurs in the second of the model Ḥaḍramī contracts discussed in Chapter 8 (Section 8.32 above). Further, according to Köhler (*EI*^{2}, article "*Munāṣafa*"), the term is found in treatises on *muzāraʿah* to mean harvest sharing but it is also used to mean tax sharing especially between Muslim and non-Muslim communities in the mediaeval context. Cf. *nisf* (half).

B. YEMENI TERMS FOR SHARECROPPING ANIMALS:

	Root	Term	Comments
19	ربع *r-b-ʿ*	مرابعة *murābaʿah*	From root *r-b-ʿ* ("four-ness"). The term is used by farmers in the Dhamār and Radāʿ areas of North Yemen to mean a contract for sharecropping animals.
		رباع *ribāʿ*	Variant of *murābaʿah,* used by farmers in the same areas of North Yemen.
20	ربو *r-b-w*	مراباة *murābāh*	From root *r-b-w* (upbringing, rearing). The term is used by farmers in the central Tihāmah area of North Yemen to mean a contract for sharecropping animals.
		رباء *ribāʾ*	Variant of *murābah,* used by farmers in the area to the southwest of Ṣanʿā'.
21	رعي *r-ʿ-y*	ترعّى *taraʿʿā*	From root *r-ʿ-y* (grazing, tending). The term is used by farmers in the Shibām-Kawkabān area of North Yemen to mean a contract for sharecropping animals.
22	شطر *sh-ṭ-r*	مشاطرة *mushāṭarah*	From root *sh-ṭ-r* ("halving"). The term is used by farmers in the Dhī al-Sufāl, al-Qāʿidah and al-ʿUdayn areas of North Yemen to mean a sharecropping contract involving animals.
		شطار *shiṭār*	Variant of *mushāṭarah* used in the same areas of North Yemen.
		شطر *shaṭar*	Variant of *mushāṭarah* used in the same areas of North Yemen.

APPENDIX 2

ARABIC TEXT OF THE ARTICLES DEALING WITH SHARECROPPING IN THE YEMENI CIVIL CODE *AL-QĀNŪN AL-MADANĪ*

The text of these Articles has been summarised and discussed in Chapter 3 (Section 3.5 above).

القانون المدني: المعاملات الشرعية

الكتاب الثالث: العقود المسماة في الفقه الشرعي

القسم الثاني: العقود التي تقع على المنفعة والعمل

الباب الأول: عقد الإيجار «الإجارة»

الفصل الرابع

المغارسة والمزارعة والمساقاة (pp. 79-81)

والمذكرة الإيضاحية للكتاب الثالث من القانون المدني

المغارسة والمزارعة والمساقاة (pp. 317-20)

الفرع الأول: المغارسة

مادة ٧٣٣:

المغارسة الصحيحة أن يستأجر مالك الأرض من يغرس قدراً معلوماً من أرضه بغرس معين من عند الأجير من الأشجار التي لها أصل ثابت، ويقوم الأجير بتربية الغرس حتى يكتمل صلاحه وتبدو ثمرته في مدة معلومة بأجرة معلومة ولو جزءاً معلوماً من الأرض والغرس، وهذا النوع

من المغارسة ملزم للطرفين بما تراضيا عليه حال العقد وليس لأحدهما الفسخ، ولا تعود الأرض كاملة إلى مالكها إلا بذهاب كامل الغرس أو باتفاق الطرفين.

مذكرة إيضاحيّة:

عرفت المغارسة الصحيحة وهي التعاقد بين مالك الأرض والغارس على أن يغرس في الأرض شجراً له أصل ثابت، مما يمكث في الأرض كالنخيل والكرم ونحوه، وأن يتعهده مدة معينة حتى يؤتي ثمرة بأجرة معلومة ولو جزءاً من الأرض أو الثمر، وقد شرعت للمصلحة وانعقد الإجماع على مشروعيتها بلا خلاف لحديث (أرض خيبر المروي عن ابن عمر).

كما بينت المادة حكم المغارسة الصحيحة وهو أنـــها بمجرد انعقادها بشروطها تكون ملزمة للطرفين بما تراضيا عليه حال العقد فلا يكون لأحدهما فسخها بإرادته المنفردة، ولا تعود الأرض لمالكها إلا بعد ذهاب كامل الغرس أو باتفاق الطرفين.

مادة ٧٣٤:

إذا أختل شرط أو أكثر من شروط الصحة فالغروس للغارس وعليه أجرة المثل، وعند التفاسخ يخير الغارس بين تفريغ الأرض بقلع الغروس، ويرجع بنقصانـــها وهو ما بين قيمتها قائمة ليس لها حق البقاء وقيمتها مقلوعة أو تركها لرب الأرض وأخذ قيمتها قائمة ليس لها حق البقاء.

مذكرة إيضاحية:

تبين حكم اختلال شرط أو أكثر من شروط صحة المغارسة المنصوص عليها في المادة السابقة كان تكون المدة أو الأجرة غير معلومة

العقد لا يصح، على أنه إذا كان الغرس قد تم فالمغروس للغارس وعليه أجرة مثل الأرض، وإذا اتفق الطرفان على التفاسخ كان الخيار للغارس بين تفريغ الأرض بقلع الغروس والرجوع على صاحب الأرض بالفرق بين قيمتها قائمة ليس لها حق البقاء وقيمتها مقلوعة وذلك لأنه إنما وضع الغراس في الأرض بإذن مالكها، ومن ثم فالخيار الثاني هو إبقاؤها في الأرض لما لكلها بقيمتها قائمة ليس لها حق البقاء.

مادة ٧٣٥:

ما وضع بتَعَدٍ من غرس أو بناء أو نحوهما وجب على واضعه إزالته وتسليم ارش الأرض—لما لحق بـــها من ضرر بسبب القلع والإزالة، ما لم يرغب مالك الأرض في بقاء الغروس أو البناء ونحوهما، فعليه تسليم قيمة الغروس أو الإنقاص قائمة ليس لها حق البقاء. وعلى الواضع تعدياً أجرة الأرض بما يقدره عدلان وارش جناية ما أحدثه.

مذكرة إيضاحية:

تبين حكم ما وضع في الأرض بتعدٍ من الغارس أو الباني أو نحوهما فحكمه حكم الغصب فيجب على الغارس أو الباني إزالة غرسه أو بنائه، وتعويض مالك الأرض عما أصابـــها من ضرر وبسبب القلع أو الإزالة، ما لم يختر المالك بقاء الغراس أو البناء أو نحوهما فيلزم بقيمتها قائمة ليس لها حق البقاء وعلى الغارس أو الباني أجرة الأرض بما يقدره عدلان عن المدة التي بقي فيها غراسه أو بناؤه قبل اختيار المالك وكذا عليه أرش جناية ما أحدثه.

مادة ٧٣٦:

ما لم يرد حكمه في المواد المتقدمة يرجع فيه لعرف الجهة.

مذكرة إيضاحية:

احتاطت المادة فنصت على أن ما لم يرد في شأنه نص يرجع فيه إلى عرف الجهة ذلك أن الغارسة تحكمها الأعراف المحلية فلزم التنويه إلى ذلك.

الفرع الثاني: المزارعة والمساقاة

أولا: المزارعة:

مادة ٧٣٧:

إذا أجر رب الأرض أرضاً معلومة لشخص آخر ليزرعها زرعاً معلوماً مدة معلومة كان العقد مزارعة صحيحة ملزماً للمتعاقدين ولا تفسخ إلا برضائهما أو لإخلال الأجير بشروط الإقامة المتفق عليها حال العقد، أو امتناعه عن تسليم الأجرة.

مذكرة إيضاحية:

اختارت اللجنة ورجحت الرأي القائل بصحة المزارعة مدة معلومة ولو كانت جزءاً معلوماً مما تنتجه الأرض أو ضماناً من نوعه وذلك لحديث (أرض خيبر المروي عن ابن عمر من أن النبي صلى الله عليه وسلم دفع إلى أهل خيبر أرضها على أن يعملوها ويزرعوها ولهم شطر مما يخرج منها) وهذا الحديث المتفق على صحته نص صريح في جواز تأجير الأرض بجزء ما يخرج منها، وقد استمر الحال على ذلك إلى حين وفاة الرسول صلى الله عليه وسلم وفي عهد خلفائه الراشدين.

مادة ٧٣٨:

إذا أجر رب الأرض أرضاً معلومة لشخص آخر ليزرعها حرثاً وبذراً وتنقية فيما تصلح له بجزء معلوم مما تنتجه الأرض، كان العقد ملزماً للمتعاقدين بشروطه المتفق عليها حال العقد، وللمالك رفع يد الأجير بعد حصاد الزرع القائم إذا خالف العرف أو أهمل أو فرط أو أخلّ بما شرط عليه أو عجز وللأجير مقابل ما غرمه في إقامة الأرض (العناء) ما يقدره عدلان إذا كان الزرع مما لا يقطع العناء عرفاً لكل من المتعاقدين طلب إنهاء المزارعة بعد حصاد الزرع القائم مع مراعاة التنبيه على الطرف الآخر قبل ذلك بوقت كاف وفي البقول ونحوها ما يستغل أكثر من مرة يعمل بالعرف.

مذكرة إيضاحية:

تبين حكم المزارعة الصحيحة التي توافرت لها جميع شروط صحتها فأن العقد يكون صحيحاً وملزماً لطرفيه بشروطه المتفق عليها حال العقد إلى حين انتهاء المدة المتفق عليها، فإذا تبين أن الأجير قد خالف العرف أو أهمل أو فرط أو أخل بما شرط عليه أو عجز كان للمالك بعد حصاد الزرع القائم أن يرفع يده، في مقابل ما غرمه في إقامة الأرض وإصلاحها وهو المعروف بالعناء الذي يبقى أثره بعد حصاد الزرع القائم إن كان الزرع مما لا يقطع العناء عرفاً، وإذا لم يكن الطرفان قد اتفقا على مدة معينة فإن المزارعة تكون صحيحة لزرعة واحدة وتجدد بزراعة أخرى وهكذا ما لم ينبه أحد الطرفين الآخر بإنـــهائها بعد حصاد الزرع القائم، وإن يكون

التنبيه قبل الحصاد بوقت كاف، وقد استثنت اللجنة البقول ونحوها مما يحصد أكثر من مرة فجعلت حكمه للعرف.

مادة ٧٣٩:

لا يجوز تأجير جزء من الأرض يزرعه الأجير للمالك مقابل إعطاء الأجير جزءاً آخر من الأرض يزرعه لنفسه.

مذكرة إيضاحية:

بينت المادة حكم النوع من المزارعة المعروف بالمخابرة، وهو أن يدفع مالك الأرض جزءاً منها إلى أجير ليزرعه لحساب المالك في مقابل جزءاً آخر يزرعه لحساب نفسه، فهذا النوع من المزارعة باطل للحديث الصحيح الذي رواه البخاري ومسلم عن ابن عمر قوله (انا كنا أكثر الأنصار حقلاً،[2] فكنا نكري الأرض على أن لنا هذه ولهم هذه، فربما أخرجت هذه و لم تخرج هذه فنهينا عن ذلك.

مادة ٧٤٠:

لا يجوز للمزارع أن يتنازل عن الأرض أو يؤجرها لغيره إلا بإذن المؤجر.

مذكرة إيضاحية:

نصت المادة صراحة على أنه ليس للمزارع أن يتنازل عن الأرض مدة الإجارة أو يؤجره لغيره في خلالها إلا بإذن المؤجر قطعاً للنـــزاع بينهما وهو ما يتفق مع القاعدة العامة التي أخذ بـــها القانون.

مادة ٧٤١:

إذا ترك الأجير المقصود من العمل بعد أن حرث وأصلح الأرض ولم يزرعها فإن كانت المزارعة صحيحة سقطت غرامته في الحرث والإصلاح ما لم يكن الترك لعذر أو اختل فيه شرط من شروط الصحة استحق الأجير غرامته بما يقدره عدلان.

مذكرة إيضاحية:

تبين المادة حكم تراك المزارع للأرض بعد أن حرثها وأصلحها ولكنه لم يزرعها فإن كانت المزارعة صحيحة، فهي ملزمة له، وقد أخل بشروطها فعليه ضمان ذلك بأن تسقط غرامته في الحرث والإصلاح ما لم يكن تركه للأرض واختل شرط من شروط صحتها فلا تكون ملزمة له، ومن ثم فانه يستحق غرامته بما يقدره عدلان.

الثاني: المساقاة:

مادة ٧٤٢:

المساقاة الصحيحة هي أن يستأجر مالك غرس أو زرع شخصاً لإصلاح غرسه أو زرعه وتنقيته وسقيه أورادا معلومة فتكون ملزمة للمتعاقدين ولا تفسخ إلا برضائهما أو لإهمال أو تفريط أو جناية من العامل، أو لعدم الوفاء من المالك بما شرط للعامل من الأجرة.

وما اختل فيها شرط من شروط صحتها يجوز للمتعاقدين فسخها قبل العمل وبعد العمل يستحق العامل أجرة المثل عما قام به من عمل.

مذكرة إيضاحية:

المساقاة بشروطها المنصوص عليها في المادة من حيث عمل المساقي ومدة المساقاة والأجرة، هي إصلاح الغرس أو الزرع وتنقيته وسقيه أورادا معلومة بأجرة معلومة، ولو جزءاً مما تنتجه الأرض، وهي صحيحة، وملزمة للطرفين، ولا تفسج إلا برضائهما أو لإهمال أو تفريط أو جناية من العامل، أو لعدم الوفاء من المالك بما شرط للعامل من أجرة، وهذا متفق عليه لحديث أرض خيبر المتقدم ذكره.

أما ما اختل فيه شرط من شروط صحة المساقاة فغير ملزم للطرفين قبل العمل وبعده ويستحق العامل أجرة مثل ما قام به من عمل.

مادة ٧٤٣:

لا يجوز للعامل أن يتنازل عن المساقاة لغيره إلا بإذن المالك.

مذكرة إيضاحية:

قطعاً للتراع نصت المادة صراحة على أنه لا يجوز للعامل أن يتنازل عن المساقاة لغيره بغير إذن المالك.

الثالث: أحكام مشتركة:

مادة ٧٤٤:

إذا اختلف المالك مع الأجير أو العامل على الأجرة فالقول قول نافي الزيادة، وإذا اختلفا في الإذن فالقول للمالك في نفيه.

مذكرة إيضاحية:

الأحكام المنصوص عليها في هذه المادة تشمل المزارعة والمساقاة وهي تبين حكم الاختلاف بين مالك الأرض والمزارع في المزارعة، أو العامل في المساقاة فإذا كان الخلاف على الأجرة ولا بينة لأحدهما على مقدارها فالقول لمن ينفي الزيادة لأن الأصل عدمها، وإن كان الخلاف على إذن المالك بشيء فالقول قوله في نفيه لأن الأصل عدمه.

Notes to the Articles of *al-Qānūn al-Madanī*:

[1] أخلّ : In the original text, دخل is printed, which makes no sense.

[2] حقلاً : In the original text, the word is wrongly printed حقاً .

APPENDIX 3

ARABIC TEXTS OF THE YEMENI SHARECROPPING CONTRACTS AND PLEAS DISCUSSED IN THIS BOOK

(A) Three Contract Formats from Ḥaḍramawt
Source: the late 19th century Ḥaḍramī Ms. by Shaykh Muḥammad bn ʿAbdallāh bn Aḥmad Bā Sawdān, published by R.B. Serjeant (1964 :61-62).

An English translation of these three contracts has been given in Chapter 8 (Section 8.32 above).

(١) صيغة المساقاة

فيكتب: الحمد لله، وبعد، فقد ساق[1] (كذا) فلانٌ فلاناً على النخل المعروف بكذا، مساقاة شرعية، مدة سنة كاملة، أوّلـــها شهر كذا، بناصفة الثمرة؛ وعليه إصلاح النخل المذكور، وتلقيحه، وتنقية نـــهره، وإصلاح الأحاجين،[2] وتنحية الحشيش، وحفظ الثمر وجذاذه وتجففه؛ يفعل ذالك[3] بنفسه، أو بنايبه[4]

(٢) صيغة المخابرة والمفاخذة

ويقال لها المناصبة؛ وهي دفع الأرض لمن يغرسها من عنده، والشجر بينهما بالسويّة أو التفضيل. فيكتب: الحمد لله، وبعد، فقد اتّفق فلان وفلان على أن يغرس فلان مكاناً، أو أرض الفلاني. ثم يحددها به حفرة بما شاء من أنواع النخل، وعلى الفخيذ المَقالِع، والمُؤَن، والسقى، والتنمية الى التعتيق

بعُرف الجهة؛ وذالك فخذ النصف، أو على المناصفة تخابرا على ذالك مخابرة ومفاخذة صحيحة شرعية. كان ذالك بتاريخ يوم كذا من عام كذا.

(٣) صيغة المزارعة والمخابرة في الارض لمن يزرعها

فيكتب: الحمد لله، وبعد، فقد قال فلان لفلان زارعتُك على ارض كذا؛ وينعتها؛ لتزرعها، وعليّ بذرها، وعليك نصف ثمرتـــها. ومثله: عليّ ارض كذا، وعليك بذرها، ولك نصف ثمرتـــها، مزارعة، أو مخابرة، صحيحة صريحة شرعية، جامعة الشروط المقتضية للصحة المرعية. كان ذالك بتاريخ كذا في عام كذا.

Notes on the Bā Sawdān Contract Formats:

[1] ساق : Read ساقَى .

[2] أحاجين : Incorrectly written أجاجين in the original text.

[3] ذالك : Read ذلك , as throughout.

[4] بنايبه : Read بنائِبِهِ .

(B) Three Written Contracts from al-'Udayn
Source: the *Amīn* ("Recorder") of al-'Udayn

An English translation of these three contracts has been given in Chapter 8 (Section 8.33 above).

General notes on the contracts:

The Yemeni geographical directions قبليا *qiblīy*^{an}, northward, on the north side (the direction of the *Qiblah*), and عدنيا *'adanīy*^{an}, southwards, on the south side (the direction of Aden) are used several times in these contracts and are not given special mention in the notes. "Eastwards" and "westwards" remain however in their Standard Arabic forms شرقيا *sharqīy*^{an} and غربيا *gharbīy*^{an}, and in the section of the Wādī 'Annah in which al-'Udayn is located (where the flow of the *wādī* is almost due westwards) they correspond respectively with "upstream" and "downstream".

السائله *al-sā'ilah* is the bed of the Wādī 'Annah, while المدينه *al-madīnah* is in every case al-'Udayn.

The documents are essentially working documents in modern Yemeni vernacular Arabic with no pretensions to any literary merit. Thus, for example, ذلك is spelt ذالك throughout, and the *hamzah* is frequently seated irregularly. Such departures from the Standard Arabic orthographical rules have been left unchanged in the following transcriptions, and they have been commented on in the notes only in instances where comprehension might otherwise be impaired.

Transcription of Text of al-'Udayn Contract No.1

بسم الله الرحمن الرحيم

حضر لدينا عبد الله محمد عقيل بنى زهير[1] ممسأ[2] الشرقى[3] وصادق عن نفسه مصادقه صحيحه شرعيه بأنه اجير من الشيخ عبد القوى بن ملهى وخلطئه[4] وهم اولاد على ملهى[5] وعبد الله هزاع[6] وذالك موضع الرمـــ[ـــانة][7] الذي

يحده قبليا السائله وغربيا الخريشبه[8] ومن اعلا[9] ملك المذكورين بيد الأجير مرشد ملاك[10] بحضور الشهود وهم عبده محمد مرشد المدينه وهزاع مهدى جبل بحري[11] وكفى باالـــله[12] شهيدا وحرر بتأريخه شهر محرم سنه ١٤٠٧ الف واربعمائة وسبعه من هجرة النبى عليه افضل الصلاة ولسلام[13] وكان الأجير المذكور اجير غير مالك وعليه تسليم الظمان[14] الى محل القبض وحفض[15] الحدود وتسليم الصواءب[16] سالف البلد كتب الراجى عفو ربه [توقيع الأمين:] عبد الله عبده عبد الله

Notes to al-'Udayn Contract No.1:

[1] بنى زهير Banī Zuhayr, the *'uzlah* on the south side of Wādī 'Annah, opposite al-'Udayn. (An *'uzlah* is an administrative subdivision of a *nāḥiyah* ("district"), which in turn is a subdivision of a *qaḍā'* (approximately "governorate") or a *liwā'* (roughly "province").

[2] ممسأ : Read مَمْسَى *mamsā*, a group of houses, or subdivision of an *'uzlah*.

[3] Al-Sharqī: the name of the *mamsā*.

[4] وخلطئه : Read وخلطائه *wa-khulaṭā'i-hi*, "and his kin".

[5] 'Alī Mulhī is known to be the brother of Shaykh 'Abd al-Qawī.

[6] 'Abdallāh Hazzā' is known to be the son of Shaykh 'Abd al-Qawī's sister.

[7] الرمـــ : The word is incomplete in the Ms., but it is known to be الرمّانة al-Rummānah, an area in the *'uzlah* of Banī Zuhayr, about 2½ miles (4 km.) downstream (i.e., west) of al-'Udayn on the south bank of the Wādī 'Annah.

[8] الخريشبه al-Khurayshabah, the name of an area to the west of al-Rummānah.

[9] من اعلأ : Read من أعلاء , "from above", i.e., upstream.

[10] مرشد ملاك : This tenant's name is known in fact to be مرشد مليك Murshid Mulayk.

[11] جبل بحري Jabal Baḥrī, the name of the *'uzlah* on the north side of Wādī 'Annah.

[12] باالـــله : Read بالله .

[13] ولسلام : Read والسلام .

[14] الظمان : Read الضمان *al-ḍamān*, which, though usually meaning guaranty or insurance, is taken here to mean the landowner's share of the crop.

[15] حفض : Read حفظ .

[16] الصواءب : Read الصوائب *al-ṣawā'ib*, which in general might be translated as "things which are fitting" (cf. Lane 1862-93: 1741c, entry *ṣawāb*, "things which are fitting"; Piamenta 1990-91: 289b *ṣawib* "right, correct, true", though Piamenta (*ibid.*) also gives *ṣā'ibah*, pl. *ṣawāyib*, as meaning "compensation, indemnity". In the present context, *al-ṣawā'ib* were described by al-'Udayn farmers and others as "presents (*hadāyā*) given to the landowner" when he comes to see the crops.

Transcription of Text of al-'Udayn Contract No.2

بسم الله الرحمن الرحيم

وحضر لدينا هزاع مهدي قاسم جبل بحرى[1] وصادق عن نفسه بأنه اجير من الشيخ عبد القوى بن ملهى وذالك موضع القبائى السغير[2] كاملاً ساقيا الذى يحده قبليا السائله وغربيا وادى المشرقه[3] وعدنيا شتاف[4] وشرقيا القبائى الكبير[5] وكان المذكور اجير[6] غير مالك و[عليه] تسليم الضمان الى محل القبض وعليه حفض[7] الحدود مع الحدود وعليه مأ[8] على الأجرأ[9] سالف البلد بحضور الشهود وهم الأخ مدير الزارعه بالعدين جابر مقبل عبد الملك ومصلح محمد نايف الشراعب[10] وكفى بالله شهيدا والى ذالك موضع مناخ الشيخ[11] كاملاً يحده قبليا وغربياً المشرب[12] وشرقيا هيجت عوض[13] ولطريق[14] وعدنيا الطريق وحرر بتأريخه شهر محرم سنه ١٤٠٧هـ كتب الراجى عفو ربه

[توقيع الأمين:] عبد الله عبده عبد الله

Notes to al-'Udayn Contract No.2:

[1] جبل بحرى Jabal Baḥrī: See n.11 to al-'Udayn Contract No.1 above.

[2] القبائى السغير : Read القبائى الصغير al-Qubā'ī al-Ṣaghīr, the name of a tributary *wādī* which joins Wādī 'Annah downstream (i.e., to the west) of al-'Udayn.

[3] وادى المشرقه Wādī al-Musharraqah: a tributary *wādī* which enters Wādī 'Annah from the south, about 3 km downstream (i.e., to the west) of al-'Udayn.

[4] شتاف Shutāf: the name of a *maḥillah* (an isolated house) on a low flat spur between Wādī 'Annah and Wādī al-Musharraqah (see the previous note) near the point where they join.

[5] القبائى الكبير al-Qubā'ī al-Kabīr: the name of a tributary wādī which joins Wādī 'Annah downstream (i.e., to the west) of al-'Udayn.

[6] اجير : Read أجيراً *ajīran*.

[7] حفض : Read حفظ *ḥifẓ*.

[8] مأ : Read ما *mā*.

[9] الأجرأ : Read الأجراء *al-ujarā'*.

[10] الشراعب al-Sharā'ib, the head village of an *'uzlah* adjoining al-'Udayn.

[11] مناخ الشيخ Munakh al-Shaykh, the name of a locality.

[12] المشرب *al-mashrab*: the course of the Wādī 'Annah.

[13] هيجت عوض : Read هيجة عوض Hayjat 'Awaḍ, the terraced land belonging to 'Awaḍ (cf. n.1 to al-'Udayn Contract No.3 below).

[14] ولطريق : Read والطريق *wa-al-ṭarīq*; the road referred to is the old track from al-'Udayn westwards down the Wādī 'Annah to Tihāmah (which, in 1993, was about to be replaced by a tarred road).

Transcription of Text of al-'Udayn Contract No.3

بسم الله

وحضر لدينا حمود على قايد وصادق عن نفسه بأنه اجير من عبد الواحد عبد القوى بن ملهى وذالك هياج المقطار[1] قدم[2] بيت المتأجر[3] الذى يحده ذالك شرقيا وغربيا مشرب داحبص[4] وقبليا الطريق المنجره الى السائله

وعدنيا ملك الشيخ صادق بن طه وكان الأجير المذكور اجير[5] غير مالك
وعليه الرعويه التامه وتسليم الظمان[6] الى محل القبض وحفظ الحدود
ولمحدود[7] بحضور الشهود وهم عبد الله سيف وامين سدنا[8] غالب احمد
عقلان الجميع من المدينه وحرر بتأريخه شهر محرم سنه ١٤٠٧هـ كتب
الراجى عفو ربه
[توقيع الأمين:] عبد الله عبده عبد الله

Notes to al-'Udayn Contract No.3:

[1] هياج المقطار Hiyāj al-Miqṭār : the name of a locality. *Hiyāj* is the plural of *hayjah* (cf. n.13 to al-'Udayn Contract No.2 above) and means terraces, usually covered with orchards.

[2] قدم *qudm* (= قدّام *quddām*), in front of (cf. Piamenta 1990-91: 389b).

[3] المتأجر : Read المستأجر *al-musta'jir*, the tenant.

[4] داحبص : Read داحض Dāḥaḍ, the name of a locality.

[5] اجير *ajīr*: Read أجيراً *ajīr*^{an}.

[6] الظمان : See n.14 to al-'Udayn Contract No.1 above.

[7] ولمحدود : Read والحدود *wa-al-ḥudūd*.

[8] سدنا : Read سيِّدنا *sayyid-nā*.

All three of the al-'Udayn contracts bear the official stamp of the *amīn al-maḥall* of al-'Udayn (written without the *alif*) who is also the *amīn* of the nearby settlement of al-Sharā'ib (already mentioned in Contract No.2 above). The stamp reads as follows:

عبد الله عبده

أمين الشراعب ولعدين

الجمهورية العربية اليمنية

(C) A Model *Musāqāh* Plea, according to Baḥraq
Source: extract from the 9th/15th century Ms. by Muḥammad bn 'Umar bn Mubārak al-Ḥimyarī al-Ḥaḍramī al-Shāfi'ī, known as Baḥraq (d. 930/1524), published by R.B. Serjeant (1955a: 11).

An English translation of this plea has been given in Chapter 8 (Section 8.42 above).

ويقول في المساقاة: أدّعى بأنّ فلاناً هذا ساقانى على غَيضته الفلانيّة، بجميع ما فيها من النخل، على اختلاف أنواعها، على أنّ علىّ سقيَها وتعهّدها، وتسوية أنـــهارها، وإصلاح حفرها وسواقيها، وتلقيحها، وحفظ ثمرها، وجدادها، وغيره ممّا فيه صلاحها. ولى فى مقابلة عمل ذلك الثلث، (مثلاً)، من الثمرة الحاصلة منها؛ وقد امتنع من ذلك، (أو) هرب، (مثلاً)، (أو) قصّر فى عمله، وأنا مطالب له بالوفاء بما التزمه.

(D) Two Model *Musāqāh* Pleas, according to the Bū Numayy Ms.
Source: the Ms. by the Sayyid Muḥsin bn Ja'far bn 'Alawī Bū Numayy, from al-Mukallā, published by R.B. Serjeant (1964: 63).

An English translation of these pleas has been given in Chapter 8 (Section 8.42 above).

باب المساقاة

(١) صورة دَعوى المالك [في] المساقاة

أن يقول زيد: أدّعى بأنى ساقيت عمراً هذا على البستان الفلانى بجميع ما فيه من النخل على اختلاف انواعها، على أن عليه سقيها وتعهدها وتسوية سواقيها وإصلاح الحفر التى فى أثناء السواقى وتلقيحها وحفظ ثمرها وقطعها وغير ذلك مما فيه صلاحها، وله فى مقابلة عمله الثلث من الثمرة الحاصلة منها، وقد امتنع من ذلك، أو هرب، أو قصر فى عمله، وانا مطالب بالوفاء بما التزامه من العمل، فمُرْه، أيها الحاكم، بوفاء ذلك.

(٢) صورة دعوى العامل بمقابلة عمله في المساقاة

أن يقول عمرو: أدعى ان زيداً ساقانى على البستان الفلانى بجميع ما فيه من النخل على اختلاف انواعها، على أن علىّ سقيها وتعهدها وتسوية سواقيها وإصلاح حفرها وتلقيحها وحفظ ثمرها وقطعه وغير ذلك مما فيه صلاحها، ولى في مقابلة عملى الثلث من الثمرة الحاصلة منها، وانا مطالب له بما شرط من الثمرة حالاً، وهو يلزمه وقد امتنع ذلك، فمره، أيها الحاكم، بتسليمه الىّ.

APPENDIX 4

ARABIC TEXT OF THE *BĀB AL-MUSĀQĀH* FROM THE YEMENI MS. *FATĀWĀ IBN JA'MĀN*

These *fatwā*s have been summarised and discussed in Chapter 8 (Section 8.5 above).

The numbering of the *fatwā*s 1 to 6 is editorial. They are not numbered or otherwise identified in the Ms. The paragraphing, punctuation and vocalisation have similarly been added.

The word مسألة *mas'alah* to introduce each question is spelt مسئله (sometimes without the *hamzah*) throughout the Ms., and the dots and *hamzah* from the word أجاب *ajāba* introducing the Shaykh's reply are frequently missing. The dots on *tā' marbūṭah* are also generally missing in the Ms. and have been added in the following transcription. The word ذلك *dhālika* is written ذالك throughout the Ms. and has been normalised here, as have the spellings of words with *hamzah*s, such as فائت *fā'it* (فايت in the Ms.), القلائد *al-qalā'id* (القلايد in the Ms.), and شيء *shay'* (شيى in the Ms.). The verb ساقى (always ساقا in the Ms.) has also been normalised.

The *Bāb al-Musāqāh* is found on folios 178 to 180 of the bound Ms. and the page numbers have been inserted into the text.

باب المساقاة(178b)

(١) **مسألة** عن شخص ساقى آخر على نخل معلوم ببعض معلوم من الثمرة، ثم أن العامل المذكور قصّ في العمل

وتعاهُد النخل، فحصل بسبب ذلك نقص في الثمرة.

فهل يلزمه ذلك النقص؟

أجاب شيخنا العلامة برهان الدين إبراهيم بن محمد بن إبراهيم جعمان رحمه الله تعالى: إذا حصل في مدة المساقاة تقصير من العامل حتى أدى إلى فوات بعض الثمرة فإنه يجب عليه ضمان ما فوّته بتقصير بقائه إلى أوان الجذاذ[1] كما أفتى به شيخ مشايخنا العلامة ابن زياد[2] رحمه الله تعالى، وفي القلائد لأبي قشير الحضرمي[3] يقدر بيعه، أي الفائت من الثمرة، مع النخلة مع قصد إبقائه إلى الجداد، ثم تقوم هي وحدها، فما زاد، فهو للثمرة؛ هذا إذا كان الفائت قبل الصلاح؛ أما بعد الصلاح فالثمرة مضمونة بمثله (انتهى بمعناه). وهو أقرب مما أفتى به العلامة ابن زياد وما ذكر من الضمان، فالمراد حصة المالك من الثمرة فقط، كما هو ظاهر. والله عز وجل أعلم.

(٢) **مسألة** عن رجل ادّعى على آخرأنه ساقى عليه نخيلاً بَتّة بثمن ثمر و لم يسلمه، فأنكر المدّعى عليه، فاستشهد المدعي شاهداً[4] يشهد أن المدّعي ساقى على المدعى عليه نخلاً و لم يثبّته في السنة الماضية قبل السنة التي يدعيها المدعي المذكور. فهل تصح هذه الدعوى والشهادة والمساقاة، أم لا؟

أجاب شيخنا رحمه الله تعالى: لا تصح هذه المساقاة على الوجه المذكور ولا دعواه (179a) ولا الشهادة المرتبة عليها، ولا يلزم

المدعى عليه شيء من الثمر، إذا كان الالتزام على الوجه المشروح. والله عز وجل أعلم.

(٣) **مسألة** عن رجل ساقى على آخر نخلاً معلوماً على سهم واحد للعامل من ثمانية أسهم في ثمرة نخل المساقاة؛ فقصّر العامل فيما يجب عليه حتى تَلِفَ كثير من الثمرة. فماذا يجب على العامل؟

أجاب شيخنا رحمه الله تعالى: يجب على العامل، والحال ما ذكر، ضمان طلع النخل الذي قصر في حفظه وتنميته بتقدير بقائه إلى أوان الجذاذ وما ذكره من الضمان، فالمراد به حصة الملك[5] من الثمرة فقط، إذ لا يمكن تضمين العامل نفسه، ويستحق العامل نصيبه من الثمرة الظاهرة كما أفتى به شيخ مشايخنا العلامة المحقق عبد الرحمن ابن زياد رحمه الله تعالى ونفعنا بعلومه. والله عز وجل أعلم.

(٤) **مسألة** عن رجل يساقي آخر بسهم يصلح سهمين في نخل معين، ثم أن المساقي أفسد النخل وأهمله و لم يقم بالواجب من السقي والنابر، وأخذ شيئاً من حَمِّهِ؛ فنهاه مالك النخل عن ذلك، فشتمه ودخل في عرضه. فماذا يجب على المذكور في إفساده النخل وشتمه للمذكور؟ أفتونا.

أجاب شيخنا رحمه الله تعالى: يجب على المذكور ضمان أخذه من سعف النخل المذكورة وأرش نقص النخل إن نقص بذلك، وهو ما بين قيمته سليماً من أخذ ذلك وقيمته مقطوعاً منه؛ ذلك ويجب

عليه أيضاً ضمان ما فوّته من الطلع المذكور بتقدير بقائه. وأما شتمه لمالك النخل فيجب عليه التعزير، فيعزره بما يراه الحاكم الشرعي زاجراً له من التعزيرات الشرعية الزاجرة من جميع ما ذكر. والله عز وجل أعلم.

(٥) **مسألة** عن امرأة قَـيِّمة على أولادها القاصرين من قبل من له ذلك شرعاً، ساقت نخلاً على أولادها القاصرين على شخص آخر مدة سنة كاملة، فبسط عليها بحكم المساقاة. ثم هلك المساقي في المدة المذكورة،(179b) فبسط ورثته على النخل باقي السنة، وبسطوا أيضاً على النخل بعد مضي السنة واستمرت أيديهم عليه يأخذون ثمرته، و لم يكن لهم في بسطهم وجه شرعي. فهل يلزمهم رد ما أخذوه من الثمرة بعد مضي السنة التي ساقاها والدهم إن كانت باقية، وبدلها إن كانت تالفة إلى قيمة الأيتام المذكورة ، والحال ما ذكر، أم لا؟

أجاب شيخنا رحمه الله تعالى: سنة المساقاة ثمرة النخل مشتركة بين ورثة العامل والقاصرين المذكورين؛ فإذا بسط ورثة العامل على جميع الثمرة المذكورة وجب عليهم رد حصة القاصرين منها إن كانت باقية، ورد بدلها إن كانت تالفة؛ وما استمرت أيديهم عليه من ثمرة النخل المذكور بغير عقد مساقاة ولا وجه شرعي وجب عليهم رده إن كان باقياً ومثله إن تلف إلى القيمة المذكورة. والله عز وجل أعلم.

(٦) **مسألة** عن رجل يملك نخلاً ساقاه على رجل آخر يسمى عاملاً مدة سنة كاملة على أن للعامل المساقي سهماً واحداً وهو النصف من الثمرة المتحصلة من النخل في المدة المذكورة؛ وعلى المساقي التلقيح والتأبير والمسح وغيره مما يصلح الثمرة؛ واستمرت يده على النخل إلى أوان حلول الثمرة. فوصل مالك النخل إلى النخل فوجد ثمرته مختلة وسد خلتها من تقصير العامل عن عمل ما هو من شروط المساقاة، وما يصلح الثمرة. فهل يكون هذا الخلل من حصة العامل دون حصة المالك لكونه فرط في الثمرة، و لم يحفظها من البهائم والطيور والزنانير؟ أم لا يلزمه حفظها إلى أوان الجذاذ؟ وهل يلزم العامل[6] إصلاح الآبار الموجودة وتنقية الحشيش وإصلاح الأحاجين[7] وإصلاح الحائط؟ هل هذا من لزوم العامل كونه شريك في النصف من الثمرة؟ أم لا يلزمه ذلك؟

أجاب شيخنا رحمه الله تعالى: إذا حصل في مدة المساقاة تقصير من العامل حتى أدى تقصيره إلى (180a) فوات بعض الثمرة، وجب عليه بدل ما فوّته بتقصير تنقيته إلى الجذاذ، ويستحق تمام نصيبه من الثمرة الظاهرة.

وقول السائل : وهل يلزم العامل إلى آخره—

جوابه: أما إصلاح الآبار فإن كان بنحو حفر وبناء فعلى المالك، وإن كان بنحو تنقية وفتح مجاري الماء فعلى العامل، ويلزمه أيضاً تنقيته من الحشيش وإصلاح الأحاجين، أي الحفر حول النخل، وإصلاح الحائط، أي البئر، على ما ذكرناه. والله عز وجل أعلم.

Notes on the Ibn Ja'mān *fatwās*:

[1] الجـــذاذ *al-jadhādh*, for الجداد *al-jadād*, the harvest (lit. the cutting). On the five occasions the word occurs in these sharecropping *fatwās*, it is spelt الجذاذ four times and الجداد only once.

[2] ابـــن زيـــاد Ibn Ziyād: See Chapter 8 (Section 8.53 above). As mentioned there, this is almost certainly the known Shāfi'ī authority 'Abd al-Raḥmān bn 'Abd al-Karīm bn Ziyād al-Maqṣarī al-Zabīdī, who died in 975/1567. He is mentioned again in *Fatwā* No.3 below.

[3] أبو قشير الحضرمي Abū Qushayr al-Ḥaḍramī: See Chapter 8 (Section 8.51 above). Neither he nor his work *al-Qalā'id* has so far been identified.

[4] شهيداً *shahīd*^{an}: the Ms. has شهيد .

[5] فالمراد ... حصة المالك *fa-al-murād ... ḥiṣṣat al-mālik* ("the intention is that the owner gets his share"): The Ms. has here فالمراد ... حصة الملك, though it is considered more likely that مالك *mālik* is meant than ملك *mulk/milk*, since the phrase has already been mentioned (in an identical context) in the *jawāb* to *Fatwā* No.1.

[6] وهل يلزم العامل *wa-hal yalzam al-'āmil*: This phrase is repeated here in the Ms., probably unintentionally.

[7] الأحاجين *al-aḥājīn*: The term is explained in the text towards the end of the *jawāb* of this *fatwā* as الحفر حول النخل *al-ḥufar ḥawl al-nakhl* ("the hollows around [the bases of] the date-palms"). See also Chapter 8 (Section 8.21 above).

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Abbreviations:

BSOAS	*Bulletin of the School of Asian and African Studies.*
EI[1]	*Encyclopaedia of Islam*, Leiden, Original Edition.
EI[2]	*Encyclopaedia of Islam*, Leiden, New Edition.
JESHO	*Journal of the Economic and Social History of the Orient.*
JNES	*Journal of Near Eastern Studies.*
Rev. alg.	*Revue algérienne* (original full title: *Revue algérienne, tunisienne et marocaine de législation et de jurisprudence*), Algiers.
RSO	*Rivista degli Studi Orientali.*

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